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BLACK LUNG BENEFITS AND REVENUE AMENDMENTS OF 1981

HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON

LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1922

TO AMEND THE BLACK LUNG BENEFITS REVENUE ACT OF 1977, AND FOR OTHER PURPOSES

DECEMBER 14, 1981

Printed for the use of the Committee on Labor and Human Resources

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BLACK LUNG BENEFITS AND REVENUE AMENDMENTS OF 1981

MONDAY, DECEMBER 14, 1981

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:08 a.m., in room 4232, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles and Randolph.

OPENING STATEMENT OF SENATOR NICKLES

Senator NICKLES. Good morning. Welcome, Senator Randolph, to our meeting this morning, and our guests.

Today we are here to receive testimony on Senate bill 1922, the Black Lung Benefits and Revenue Amendments of 1981. The need for legislation in this area is very clear. The black lung trust fund is currently more than $1.5 billion in debt to the U.S. Treasury, a figure which will double in the next 4 years and will be six times as high, $9 billion, by 1995, unless some changes are enacted. Interest alone in fiscal year 1981 was more than $110 million. Yet, when the trust fund was established by the 1977 amendments, it was supposed to be a self-sustaining rather than ever increasing, deeper and deeper in debt.

I cannot believe that the insufficient tax levels alone account for that insolvency. The CBO estimates and the 1977 committee report indicated no need for advances after 1980 and that the fund would then become self-sustaining. Yet in 1982, an estimated advance of $475 million is needed for the fund. What, then, accounts for this growing indebtedness? I believe it is a result of repeated liberalization in the limited program, expanded far beyond original need and purpose.

I have with me, and I will include it in the record at the conclusion of the Senators' statements, a report by the Comptroller General to the Congress of the United States. The headline is, "Legislation Allows Black Lung Benefits To Be Awarded Without Adequate Evidence of Disability." It is dated July 28, 1980, and just to quote a couple of sections, it says:

> Social Security Administration approval of black lung claims is based on provisions of law which GAO believes do not adequately ensure that benefits are provided only to those entitled to them. Under the 1977 amendments to the Federal Coal Mine Health and Safety Act, such claims were based on affidavits from spouses and other independent persons, inconclusive medical evidence, and presumptions

> based on years of coal mine employment. GAO believes that medical evidence should be the basis for determining disability and death from black lung.

One other paragraph to highlight says:

> Projecting the results of this sample, GAO estimated that successful claimants received retroactive lump sum payments of about $353.6 million of which $312.9 million was for claims that were not based on adequate medical evidence of disability or death from black lung. The same claimants also receive about $79 million annually in monthly payments, of which $69.8 million was not supported by adequate medical evidence of disability or death by black lung.

As I said, I will submit this entire report at the conclusion of the Senators' statement.

Proponents of this legislation in 1979 estimated that the total cost of the program would be between $40 and $385 million from beginning to end. I say "end," because the initial act, passed in 1969, provided that the Federal program would end; all part B claims had to be filed prior to December 13, 1972, and no part C benefits could be payable after December 30, 1976. The act was designed to be a temporary stopgap, due to the fact that State compensation laws did not cover black lung. Presently, all 50 States' compensation programs do now cover black lung. I said "limited," because the initial 1969 act provided not only a termination date, but also provided benefits only to underground coal miners and widows of miners who were truly disabled and whose disability resulted from complicated pneumoconiosis. Subsequent amendments expanded coverage to include surface miners, self-employed miners, transporters of coal, coal mine construction workers, dependent orphans, brothers, sisters. Further expansion included additional evidenciary presumptions, limitation on the use of X-rays, liberalization of definitions of pneumoconiosis, disability of paying medical benefits, but most of all, termination dates were removed, thus transforming this temporary Federal program into a permanent program.

Added to all of this are the administrative nightmares. GAO reports that of the social security administered claims, 88.5 percent did not have medical evidence to demonstrate disability due to black lung. Preliminary indications yet to be released from GAO reports indicate that DOL administration of claims would show the same high rate of lack of medical evidence.

The history of the Federal black lung law has raised strong reservations about whether, if ever, the Federal Government should interfere with State workers' compensation programs.

I look forward to today's testimony on legislation to address these problems, and to address the problem, most importantly, of the inadequacy of the fund, and to provide adequate compensation to those workers who legitimately have black lung cases and in areas to eliminate those claims where there is no evidence of black lung.

Senator Randolph, we welcome you to this morning's hearing. We also welcome your expertise and history in this legislation and the history of legislation dealing with coal miners.

Senator RANDOLPH. Thank you very much, Chairman Nickles.

This subject matter, critical as it is now, and as it was in 1969, when we addressed this subject 1 year prior to the national program of safety and health, originally had been planned to bring this legislation to the committee for hearing and action in·1970, and to have the occupational safety and health program discussed and enter into the body of law in 1969. But very frankly, as the record will indicate, there were several of us who felt, knowing the hazards of coal mining not only from the standpoint of mining but also from the standpoint of health problems, we were able to have committee members change the attention to this subject matter and place it with the priority of 1 year prior to the legislation that I mentioned of occupational safety and health for the country as a whole, as men and women work to produce the products which America uses.

So this is not only an opportunity, again, for me to discuss the problems, the ramifications—yes, the abuses—and I could do that with almost any law which has been upon the books regardless of what the subject matter might be. But I accept this work with you, Mr. Chairman, and others of the subcommittee, and presumably of the parent committee, as a responsibility more than just an opportunity, because this is a subject that I can say, without attempting to use words that are not applicable, that the subject matter is very close to my heart and very close to the hearts of many, many thousands of West Virginians and thousands and thousands of men and women in many States of this Nation. I am gratified to participate in this hearing. It is an exploratory hearing in part. It is not to commend or to condemn. It is to bring about the facts that you will want to develop, as will I.

Of course, we think of the financial problems. Naturally, we must move into an understanding of that phase of black lung.

Now, as we face up to the situation in the black lung or pneumoconiosis trust fund, we are reminded of many funds--and I am not trying to draw a comparison—that are in difficulty in 1981, as they have been with increasing financial problems for several years. That this is a critical time in the period of the American society. As I look back to those early years of the thirties when I was here as a House Member, I wondered if there would ever be another time such as we were going through in that period. But now our problems are not so much national; they are global. And even as we consider this subject matter, we are constantly recognizing that we are in a world of uncertainty, and with all that goes with uncertainty, violence, misunderstanding, and possible conflict in one or more nations of the Earth.

And so, as we deal with the practical facts of dollars and cents, as we think of the budget, the budget constraints, and the energy concerns of our country, we are naturally attempting to cope with problems that surface from one time to another, with rather abrupt rapidity.

I turn aside just for this moment to say—and it has no efficacy in this hearing, except that I want it on the record—that had we, in 1944 and 1945 and 1946 and 1947, moved forward with the synthetic liquid fuels program for this country—and I recognize, of course, the oil that comes from the Earth in Oklahoma; you will not mind me saying that West Virginians really went out and drilled those wells, because we had been drilling wells in Pennsylvania and West Virginia a long time before those great fields in Oklahoma and Texas came into being—but had we developed the synthetic fuels program, the liquid fuels program then, we would have had no OPEC to strike down this country, because we would have had a sufficient supply of all types of fuels to take care of our needs. And even now, as we begin to pick up where we shredded it apart a long time before, the Synthetic Liquid Fuels Act of 1944, signed by Franklin Roosevelt, beginning in the pilot plants, the programs of that day, all allowed to drop and then, out of some $82 million later, when the submarines went home, say "We will go back to doing business as usual," and $3 million was returned to the Federal Government. We act after the fact so often in this country to address the needs not only of the Nation, but of the men and women who produce the products that cause this country, hopefully, to be a strong and viable one.

So, in the final analysis, as we begin to talk about black lung today, it does have—and has had for a long period of time—a direct connection with the energy programs of the United States of America.

The coal miner, the man or woman who travels deep into the Earth—and of course, we have hundreds and hundreds of women who are mining coal, just as men are mining coal in the deep mines—these are men and women who work in West Virginia, and they work in many, many other States, including not only the so-called Appalachian area, but the States of the far West, as well, and certainly, into Ohio and into Indiana and Illinois. And when these men and women, working especially in deep mines, in those depths, they are using their expertise to bring forth the coal to heat the homes, yes, and power the electric generating programs that cover this country—I often think if there was to be a blackout of America, what would happen in this country.

I remember I flew into New York City one evening when there was a blackout of whole area, and I remember what happened that night. It is a story all its own, of violent crime and all sorts of situations which I will not discuss here. For a few hours, when a blackout came to Gotham, it paralyzed that area of this country. And so, when we think of this often rich—it is in many seams, many different types, including soft and hard coal and blends thereof—when we think of this coal that comes to help move the products from the farm and the factory and the field and the mine, we are dealing, of course, with a product, but we are dealing with men and women whose lives are touched by this type of employment. When we think of our entire power structure in this country, we understand what it means for not only those who receive, as consumers, the productivity from coal, but also the men and women who are involved.

That brings us to the question that will come at this hearing and at other hearings. I want to again thank you, Chairman Nickles, for your effort, which I know will be joined by others, in this important and critical hearing.

I want to say to the miner there is a job, a difficult job, involved, and there are incredible hazards. We have made great improvements in the safety and the health of those who mine, and to take care of the pneumoconiosis payments, the black lung payments, why, we did something then that I believed in 1969 I continue to believe in the black lung program although we acknowledge that mistakes have been made, the bureaucracy which has hurt the program in part, and of course, those, as in many programs, who are given the help of the Federal Government without a clear case of the Government actually owing that individual. But as we think of the miner, of the family of the miner, when sudden death traps the miner in the form of a roof collapse—you might think you can always know what is going to happen, but in the recent accident in Bergoo, W. Va., that was a very unusual situation. A roof collapsed, and that roof collapse was, let us say, a slab of stone that is as long as this table here. It is not a little piece of something that comes down and clips you on the shoulder; it is a long, long slab. And in Bergoo, in Webster County, that came quickly, and lives were lost. It was a tragic accident, as accidents have and continue to occur throughout the State of West Virginia. Three miners lost their lives in that accident on December 4. It was just a few days later, on December 7, that explosions in a mine in Topmost, Ky., took the lives of eight miners, and that was also a sudden, devastating catastrophe. And we have had another mine disaster that took place just the next day, December 8, an explosion in Whitwell, Tenn., again shattered families by extinguishing the lives of 13 more miners.

And so, these are the tragedies, and we must speak of them, that are associated with mining. Twenty-four miners—yes, they were working a few days ago, and now, they are at rest—these are the tragic accidents.

I think that all of us, whether we are from mining States or not, our feelings are very deep when we face these tragedies.

I will, at this point, Chairman Nickles, place in the hearing record the recipients of black lung assistance in all the States of the Union. Some people are inclined to think the help goes to West Virginia, or to Kentucky or Pennsylvania, or some other, so-called mining State. The benefits go to hundreds of people in Oklahoma and across this country, and I will indicate to you the payments—hopefully, the payments that have been made properly—of course, where payments have not been made properly, I object just as you did in the very beginning of this hearing.

[The information referred to follows:]

BLACK LUNG BENEFITS TO MINERS, WIDOWS, AND DEPENDENTS IN CURRENT-PAYMENT STATUS

[Number and monthly amount by State, September 1981] [1]

State	Number				Monthly amount		
	Total	Miners	Widows	Dependents	Total	Miners	Widows
cember, total:							
1970	111,976	43,971	24,809	43,166	$12,515,000	$8,785,000	$3,730,000
1971	231,729	77,213	67,358	87,158	27,250,000	16,430,000	10,820,000
1972	298,963	101,802	88,067	109,094	37,860,000	22,920,000	14,940,000
1973	461,491	159,837	124,154	177,500	63,700,000	40,400,000	23,300,000
1974	487,216	169,097	134,700	183,419	71,500,000	45,100,000	26,400,000
1975	482,311	165,405	139,407	177,499	75,500,000	46,600,000	28,900,000
1976	469,635	158,067	142,495	169,073	77,400,000	46,500,000	30,800,000
1977	457,399	148,720	144,543	164,136	80,500,000	47,100,000	33,400,000
1978	439,970	138,648	145,829	155,493	82,300,000	46,800,000	35,500,000
1979	418,948	129,558	146,527	142,863	86,500,000	47,800,000	38,700,000
1980	399,477	120,235	146,603	132,639	91,400,000	48,800,000	42,600,000
September 1981, total	381,479	113,055	146,376	122,048	88,400,000	45,900,000	42,500,000
Alabama	18,674	4,792	8,744	5,138	3,918,000	1,949,000	1,969,000
Alaska	32	10	15	7	8,000	4,000	4,000
Arizona	1,022	300	423	299	244,000	123,000	121,000
Arkansas	2,475	779	899	797	582,000	326,000	256,000
California	3,051	793	1,516	742	752,000	318,000	434,000
Colorado	3,009	965	1,156	888	717,000	387,000	330,000
Connecticut	837	209	422	206	205,000	84,000	121,000
Delaware	426	115	187	124	101,000	47,000	54,000
District of Columbia	176	39	96	41	43,000	15,000	28,000
Florida	6,741	2,092	2,362	2,287	1,552,000	869,000	683,000
Georgia	696	167	345	184	167,000	67,000	100,000
Hawaii	15	3	3	9	2,000	1,000	1,000
Idaho	107	31	42	34	24,000	12,000	12,000
Illinois	20,926	5,740	9,915	5,271	5,142,000	2,305,000	2,837,000
Indiana	9,490	2,658	4,156	2,676	2,253,000	1,052,000	1,201,000
Iowa	2,349	692	1,034	623	573,000	277,000	296,000
Kansas	1,106	289	569	248	276,000	114,000	162,000
Kentucky	46,200	14,481	13,629	18,090	10,119,000	6,070,000	4,049,000
Louisiana	169	44	75	50	40,000	18,000	22,000
Maine	17	6	8	3	4,000	2,000	2,000
Maryland	3,661	971	1,771	919	894,000	384,000	510,000
Massachusetts	162	29	99	34	40,000	11,000	29,000
Michigan	4,537	1,120	2,327	1,090	1,120,000	450,000	670,000
Minnesota	90	21	44	25	21,000	8,000	13,000
Mississippi	184	53	85	46	45,000	21,000	24,000
Missouri	1,544	416	731	397	378,000	168,000	210,000
Montana	561	181	225	155	134,000	70,000	64,000
Nebraska	35	8	21	6	9,000	8,000	1,000
Nevada	238	67	107	64	57,000	27,000	30,000
New Hampshire	45	13	21	11	11,000	5,000	6,000
New Jersey	3,521	861	1,828	832	869,000	347,000	523,000
New Mexico	937	285	356	296	218,000	114,000	104,000
New York	2,758	634	1,524	600	688,000	251,000	437,000
North Carolina	1,750	509	673	568	407,000	210,000	197,000
North Dakota	53	11	32	10	14,000	5,000	9,000
Ohio	22,689	6,456	9,558	6,675	5,362,000	2,590,000	2,772,000
Oklahoma	2,227	688	843	696	525,000	282,000	243,000
Oregon	266	66	134	66	65,000	27,000	38,000
Pennsylvania	110,863	32,412	46,131	32,320	26,135,000	12,887,000	13,248,000
Rhode Island	64	17	21	26	13,000	7,000	6,000
South Carolina	389	110	161	118	93,000	45,000	48,000
South Dakota	28	9	13	6	7,000	3,000	4,000
Tennessee	12,790	3,881	4,486	4,423	2,917,000	1,609,000	1,308,000
Texas	749	196	353	200	179,000	77,000	102,000
Utah	1,863	577	691	595	437,000	239,000	198,000
Vermont	24	6	12	6	5,000	2,000	3,000
Virginia	22,712	7,025	6,961	8,726	5,002,000	2,943,000	2,059,000
Washington	772	249	339	184	173,000	76,000	97,000
West Virginia	67,958	21,419	21,929	24,610	15,208,000	8,726,000	6,482,000
Wisconsin	189	40	105	44	47,000	17,000	30,000
Wyoming	1,025	297	462	266	251,000	118,000	133,000
Other	1,434	357	750	327	354,000	138,000	216,000

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[1] Benefits payable under the black lung program established by the Federal Coal Mine Health and Safety Act of 1969. The program is administered by the Social Security Administration but is from the general funds of the Treasury.

Senator RANDOLPH. In 1981, there have been 143 deaths that have been due to accidents in our coal mines. Every day when a miner enters a coal mine, whether it is on a day shift, or a night shift, or in between, he must consider the dangers associated with his occupation. And I cannot tell you how often he thinks of that distance between life and death. There is a realization that it is a dangerous occupation, and the members of the miner's family today, of course, understand what can take place, and in a sense, they wait for his safe return.

Now, every miner does not face a mine accident, but every miner does face the possibility of developing the disabling black lung disease which is a part of the work that that miner man or woman does. Every miner who breathes coal dust, we are glad, does not contract one of the disabling occupational diseases, but for those who do suffer from these irreversible—and I use that word advisedly—debilitating diseases, and for their surviving dependents, we properly, I think—as I have indicated first in 1969 and with amendments since—have had a compensation program. I am not going to go into how the first payments were made and the shifts from Federal Government to private industry, at the moment. But I do believe that there will be desire within the Congress—I hope so—to preserve a strong and workable and fair compensation program for those individuals who constantly, under the pressure of that which must happen—and we hope it happens infrequently, but it happens—those who work within the mines hour after hour and day after day and year after year, they suffer as they produce that coal; they have impaired breathing and disability from pulmonary and respiratory diseases resulting from prolonged inhalation of coal dust. And there is no adequate compensation to substitute for their health.

I want it made very clear that, of course, there are thousands and thousands of miners who, after they have worked in the mines, are rugged men; apparently, they have not been touched. And I would not be fair if I said that all those who work in the mines come out as disabled or as men and, in some cases increasingly, as women who are unable to hold, perhaps, other positions if they decide to stop mining and go into some other form of work.

There is no substitution, Mr. Chairman, in compensation for that family who loses the life of a father, a husband, or oft times, I know in one family, three sons, leaving the mother and the father, in one accident.

So this is a terrible situation which constantly is in the background. That is why I am speaking of it in this rather grave way at this point. But, Mr. Chairman, we tried in 1969, and we have been trying since, to audit this program, to keep checks on what is being done, and not always succeeding. But those who understand the costs of these programs and say it is absolutely a program or programs we cannot afford, why, I say, Mr. Chairman, again, that we have a national policy established under the Federal Coal Mine Health and Safety Act of 1969 as amended, which states in part that ". . . the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner." That is in the record that came out of this committee, of which you are an able member at the present time.

And further to quote,

> . . . there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

That is a direct quote, also.

Mr. Chairman, you know that in title IV of the Federal Coal Mine Health and Safety Act, the original act of 1969, as amended, we provided for benefits to miners who have contracted the occupational disease of pneumoconiosis, or black lung, as it is called, who are first of all, totally disabled as a result of that situation.

The black lung program, is part and parcel of the commitment of the American people, expressed through Congress and succeeding Congresses and administrations, to the miners, to their families. And yet, I pause to say I am very earnest with you in working very carefully now, as we look at what has happened to the operation of the law. We are concerned. We understand the serious financial problems that face this black lung disability trust fund, which provides the payments to the beneficiaries who qualify under the law, and we want no one to receive that payment who does not qualify under the law for the compensation.

Now, the deficit facing this trust fund, there must be a resolution to it, and this measure, a proposal by the administration in the form of S. 1922—and who has cosponsored that measure as members of this committee?

Senator **Nickles**. Presently, we have Senator Hatch, yourself, and Senator Heinz.

Senator **Randolph**. Yes. And I have gone on that measure not reluctantly. I have gone on it with Senator Hatch, our chairman, Senator Heinz of the Commonwealth of Pennsylvania, and with yourself, Mr. Chairman and we hope there will be others. But I went on the legislation, not endorsing a single word or a single line, but the purpose of the legislation. It is necessary. And I did not want to hang back, as it were. I wanted to join with our chairman and perhaps, others, as we would move deeply into a reasoned, practical measure that could be adopted which would in part, at least, straighten out the rather tangled financial situation that has come about during the years of the operation of the law.

So, we want to have that fund solvent. I am anxious to hear our witnesses. They will come from many segments of our society and industry. And again I say, without a pleasantry, this is going to be a very important hearing process for you, who are a young Member of the Senate. It is going to take someone like you, who will move into this area and will continue the hearings, continue the field trips, continue whatever is necessary to straighten out the situation, which we know is a very vexing and a very critical one, and for those mistakes that have been made, we can mark up some of them, of course, to human nature itself, but to other mistakes that were made because of—you used the word bureaucracy—whatever it might be, we want to weed them out and set them apart, and those that have brought the situation into being, they must, as we in the Congress must, be held accountable.

Thank you.

[The prepared statement of Senator Randolph follows:]

PREPARED STATEMENT OF SENATOR RANDOLPH

Senator **RANDOLPH**. Mr. Chairman, I appreciate the opportunity to address a program that is very close to my heart and very close to the hearts of many West Virginians. I am pleased to join you in this hearing to address the financial problems facing the Black Lung Disability Trust Fund.

Mr. Chairman, this is a critical time in our Nation, we must deal with budget constraints and energy concerns and many other issues, but we must not forget as we press ahead, that we are here on behalf of and to serve human needs. In the final analysis, the first priority of the black lung program is the coal miner, the man or woman who travels deep into the Earth, into the core of our mountains in West Virginia for instance, and brings out of those depths, the rich, black coal which we use to heat our homes, and power our electric lights, and for many other uses around the world.

The coal miner, in the performance of his or her job, is subjected to incredibly hazardous situations, and sometimes, those situations turn into nightmares for the miner and for his family, when sudden death traps the miner in the form of a roof collapse as we know occurred in Bergoo, W. Va. That tragic accident claimed the lives of three miners on December 4. Then a few days later, on December 7, an explosion in a mine in Topmost, Ky., took the lives of eight miners just as suddenly and just as catastrophically. And, Mr. Chairman, before we could cope with these human tragedies in the coalfields of Appalachia, the very next day, December 8, an explosion in Whitwell, Tenn., again shattered families by extinguishing the lives of 13 more miners. These are tragic accidents and our hearts go out to the families and friends of these miners who were simply doing their jobs, who were simply trying to earn a living in the coal mines.

In 1981, there have been 143 deaths due to mine accidents. Every day that a miner enters a coal mine, he must consider the danger to his occupation, and while it may be in the far reaches of his mind, every miner knows the danger that may await him. And every miner's family knows the danger that may await him.

Of course, every miner does not face a mine accident, but every miner does face the possibility of developing the disabling black lung diseases. Every miner who breathes coal dust luckily does not contract one of these disabling occupational diseases, but for those who do suffer from these irreversible debilitating diseases, and for their surviving dependents, we have a compensation program, and I intend to preserve a strong compensation program for these brave, individuals, for risking their lives to mine coal. For those who suffer impaired breathing and disability from pulmonary diseases resulting from prolonged inhalation of coal dust, there is no adequate compensation to substitute for their health. And there is no substitution in compensation for a family who has lost their loved ones—husbands, fathers, sons, brothers and now also wives, mothers, daughters and sisters—to these terrible diseases. But, Mr. Chairman, we must try.

Mr. Chairman, there are those who look at the costs of these programs and say we cannot afford them. But, Mr. Chairman, this

Nation has a national policy, established under the Federal Coal Mine Health and Safety Act of 1969, as amended, which states in part, that:

> The first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;

and further, that:

> There is an urgent need to provide more effective means and measures for improving the working conditions and practices in the nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

As you know, Mr. Chairman, title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended provides for benefits to miners who have contracted the occupational disease of pneumoconiosis and who are totally disabled as a result. The Black Lung program as it is called is part of this Nation's commitment to our miners and their familes, and I am deeply concerned about the financial problems facing the Black Lung Disability Trust Fund, which provides the payments to beneficiaries who qualify under the law for their compensation.

The deficit facing the Black Lung Disability Trust Fund must be resolved, and this measure, a proposal by the administration, which is before us today is a plan to bring solvency to the fund. I am anxious to hear our witnesses address this proposal today and appreciate your leadership in calling this hearing this morning.

Senator Nickles. Thank you, Senator Randolph. We very much appreciate your concern and commitment to making some most needed reforms.

We will, at this point, receive for the record a prepared statement by Senator Hatch, the chairman of the full committee, to be followed by the GAO report referred to earlier.

[The prepared statement of Senator Hatch and report referred to follow:]

PREPARED STATEMENT OF SENATOR HATCH

Senator Hatch. This hearing has been convened to consider a measure which I have had the privilege of introducing, with my distinguished colleagues, Senator Randolph, Senator Nickles and Senator Heinz, on behalf of the administration. The proposal promises to bring solvency to a program that is now virtually bankrupt. The program, as structured by the 1977 amendments, was supposed to be financially self-sufficient by 1984. However, today the trust fund is in debt to the Treasury by approximately $1.5 billion. The indebtedness is projected to skyrocket to $5.7 billion in 8 years, and reach $19.7 billion by the year 2010. In short, unless a strong new source of revenue is injected, the trust fund will never be self-sustaining. Thus everyone agrees that a key component to a solution to the problem is a tax increase. The bill does this. But recongizing the tax increase under current projections will make the fund solvent by 1995, the bill makes this increase temporary—terminating by 1995, or earlier if solvency is achieved before then.

The bill also addresses what many regard as the underlying reason for the trust fund's insolvency, the eligibility criteria. Without question this has evoked tremendous controversy. Many have contended that the current criteria are simply too loose and that thousands of claimants who are not truly disabled have received benefits. Recent studies by the General Accounting Office have tended to confirm this. In 1980, GAO reported that 88 percent of claims approved by the Social Security Administration were based on inadequate or conflicting medical evidence. This year GAO has reported that its survey of Department of Labor-approved claims revealed 84 percent of the cases were based on inadequate or conflicting medical evidence.

However, it is always easier to state the problem than to achieve a complete solution. The bill, as developed under the guidance of the Department of Labor, reflects a consensus among the interested parties of what eligibility changes are needed to restore this as a disability program, and no longer a pension program.

I am happy that the distinguished subcommittee has the opportunity today to hear from a distinguished group of witnesses. Deputy Undersecretary Collyer has had many years of experience in the workers' compensation field. He will be explaining the administration proposal. We will also hear from representatives from the coal industry, organized labor, and the insurance industry, who will be explaining why the proposal is a good one. The Edison Electric Institute, representing the utility industry, will be sharing its thoughts on the impact of the proposed reform upon the consumer. And finally, we are very honored to have Congressman John Erlenborn here today. He is one of a very small handful of Members who have worked closely with this program since its inception in 1969. He brings to us an invaluable wealth of experience and expertise. I look forward to having his input, along with that of the other distinguished witnesses.

BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Legislation Allows Black Lung Benefits To Be Awarded Without Adequate Evidence Of Disability

Social Security Administration approval of black lung claims is based on provisions of law which GAO believes do not adequately ensure that benefits are provided only to those entitled to them. Under the 1977 amendments to the Federal Coal Mine Health and Safety Act such claims were based on affidavits from spouses and other dependent persons, inconclusive medical evidence, and presumptions based on years of coal mine employment.

GAO believes that medical evidence should be the basis for determining disability and death from black lung.

UNITED STATES GENERAL ACCOUNTING OFFICE

HRD-80-81
JULY 28, 1980

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

LEGISLATION ALLOWS BLACK LUNG BENEFITS TO BE AWARDED WITHOUT ADEQUATE EVIDENCE OF DISABILITY

DIGEST

GAO's review of a random sample of Social Security Administration (SSA)-approved black lung claims indicated that, in most cases, medical evidence was not adequate to establish a coal miner's disability or death from black lung. The approved cases were re-reviewed under the 1977 amendments to the Federal Coal Mine Health and Safety Act.

Approval of these claims was not contrary to law; it was based on provisions of law which GAO believes do not adequately assure that benefits are provided only to those disabled from black lung or to the survivors of those who died from black lung. Under the provisions of the amended legislation, SSA approved claims on the basis of affidavits from spouses and other dependent persons, inconclusive medical evidence, and presumptions based on years of coal mine employment. (See p. 8.)

The Federal Coal Mine Health and Safety Act of 1969 provided benefits to coal miners totally disabled by pneumoconiosis--commonly called "black lung"--and to dependents of miners who had died from the disease or were totally disabled from it at death. The act was amended in 1972 and 1977 to make more miners and their survivors eligible for program benefits. (See p. 1.)

Black lung is caused by inhaling substances, such as coal dust. The disease, in its advanced stages, usually causes considerable breathing difficulty and severely limits the physical capabilities of the individual.

Tear Sheet. Upon removal, the report cover date should be noted hereon.

SSA was responsible for administering all miner claims filed before July 1, 1973, all survivor claims filed before January 1, 1974, and certain survivors' claims filed within 6 months of the death of a miner. The Department of Labor is responsible for administering all other black lung claims filed after these dates. (See p. 2.)

The 1977 amendments gave claimants of previously denied black lung claims the option of having their claims re-reviewed by either SSA or Labor. (See p. 1.)

At the time of the 1977 amendments, SSA had about 165,000 previously denied claims on file. Over 118,000 miners and survivors elected to have their claims reviewed under the new law. Of these claimants, 82,434 wanted SSA to review their cases and 36,104 chose Labor. As of September 19, 1979, SSA had approved 23,178 (28.1 percent) of the 82,434 claims.

At the request of Congressman John N. Erlenborn, GAO reviewed SSA's administration and processing of the previously denied claims that it re-reviewed.

The act, as amended, requires the person claiming eligibility for benefits to provide medical or other relevant evidence to show that the miner is or was totally disabled from black lung and that it resulted from coal mine work. Where there is no medical or other relevant evidence, the act permits the use of affidavits and years of coal mine employment as evidence in establishing disability. (See pp. 3 and 4.)

GAO's review of a random sample of 200 SSA re-reviewed and approved black lung claims indicated that, in 88.5 percent of the cases, medical evidence was not adequate to establish disability or death from black lung. SSA approved claims on the basis of affidavits, inconclusive medical evidence, and presumptions based on years of coal mine employment--all of which were legal under existing legislation. (See p. 8.)

Projecting the results of its sample, GAO estimated that successful claimants received retroactive lump-sum payments of about $353.6 million, of which $312.9 million was for claims that were not based on adequate medical evidence of disability or death from black lung. The same claimants also receive about $79 million annually in monthly payments, of which $69.8 million was not supported by adequate medical evidence of disability or death by black lung. (See p. 9.)

Although GAO believes that medical evidence should be used as the basis for determining eligibility for black lung benefits; GAO is not making any legislative recommendation at this time. This review covered only SSA's administration of the program. GAO is currently reviewing Labor's administration of the black lung program. Accordingly GAO is deferring any legislative recommendation until the completion of its current review. (See p. 14.)

Labor decided not to comment on the report. SSA officials stated that the report is factually correct and the conclusions valid. They said that the legislation was amended to permit approval of claims without medical evidence of disability and that SSA's actions in approving black lung claims were therefore not contrary to law. (See p. 15.)

Senator NICKLES. Our first witness today will be Robert Collyer, Deputy Under Secretary of Labor, and with him are Craig Berrington, Associate Deputy Under Secretary, Employment Standards Administration; Robert Dorsey, Chief, Branch of Claims Determination; and Joseph Voytek, Chief, Division of Planning, Policy and Review, Office of Workers' Compensation Programs.

Mr. Collyer, welcome again before our committee. We have seen you many times and appreciate your cooperation and expertise in the very difficult and complicated areas of workers' compensation. Again, we welcome you and look forward to your testimony.

Senator RANDOLPH. I wonder, Mr. Chairman, if it would be agreeable if we could have the names and the positions that the gentlemen hold at the very beginning, even before one, two, three, four, or those that intermingle their testimony?

Senator NICKLES. Would you gentlemen please identify yourselves?

Mr. VOYTEK. Joseph Voytek, Chief of the Division of Planning, Policy and Review, Office of Workers' Compensation Programs.

Mr. DORSEY. Robert Dorsey, Chief of the Branch of Standards, Regulations and Policies, Division of Coal Mine Workers 'Compensation.

Mr. BERRINGTON. Craig Berrington, Associate Deputy Under Secretary for Employment Standards, Labor Department.

Mr. COLLYER. These are my experts.

Senator NICKLES. And this is Robert Collyer, who is Deputy Under Secretary of Labor for Employment Standards.

Please proceed.

STATEMENT OF HON. ROBERT B. COLLYER, DEPUTY UNDER SECRETARY OF LABOR FOR EMPLOYMENT STANDARDS, U.S. DEPARTMENT OF LABOR, ACCOMPANIED BY CRAIG A. BERRINGTON, ASSOCIATE DEPUTY UNDER SECRETARY FOR EMPLOYMENT STANDARDS; ROBERT DORSEY, CHIEF, BRANCH OF STANDARDS, REGULATIONS AND POLICIES, DIVISION OF COAL MINE WORKERS' COMPENSATION; AND JOSEPH H. VOYTEK, CHIEF, DIVISION OF PLANNING, POLICY AND REVIEW, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Mr. COLLYER. Mr. Chairman and members of the subcommittee, we appreciate this opportunity to appear before your subcommittee today to discuss the administration's proposal to make the black lung disability trust fund solvent and to improve the operation of the program. Those proposals have been introduced as S. 1922.

I would like to begin by discussing the changes we are proposing in eligibility and evidentiary standards. The changes will affect only those claims filed only after the effective date of these amendments.

The administration proposes to eliminate five special eligibility provisions of the act. These provisions, when enacted, were designed to deal with a large group of miners and survivors who faced great difficulty in proving entitlement based on events that happened at a time when inadequate medical and death records were kept. We believe that there is no longer sufficient reason to retain these special provisions. The improved state of the medical arts makes it easier to establish clinically whether an individual has black lung disease and to accurately assess the degree of physical impairment due to that disease.

The administration bill would eliminate three presumptions: (1) the rebuttable presumption that a miner with 10 years of coal mine employment who died as a result of a respirable disease died as a result of black lung; (2) the rebuttable presumption of black lung for miners with 15 years of coal mine employment; and (3) the rebuttable presumption of eligibility of survivors of miners who died before March 1, 1978, and who had 25 years in the coal mines prior to June 30, 1971. In our view, there is no longer a need for these presumptions.

The administration proposes the elimination of the restriction on the Department of Labor's authority to rely on a second opinion on chest X-rays in the adjudication of claims. This restriction was added by the 1977 amendments as a reaction to what was viewed to be an overly stringent eligibility policy in the past. Precluding the use of substantive evidence was not, and is not, the solution to such problems, and in fact, inhibits legitimate audint of claim validity. This does not, however, mean claims will be decided solely on the basis of X-rays.

The administration also proposes that affidavits from persons who have a direct financial interest in the disposition of the claim of a deceased miner shall not be accepted by themselves as sufficient proof that the miner was totally disabled due to black lung. These affidavits would have to be substantiated by affidavits from other persons with no direct financial interest in the disposition of the case. Under the present law, affidavits from widows and others who have a financial interest in the case may be sufficient to establish the claim. This creates the potential for an improper claims determination which would be removed by the proposed change.

The administration also proposes several changes in the area of program benefits. Here also, the changes will apply only to claims filed for part C benefits after the effective date.

The administration proposes that benefit payments to survivors be paid only where it can be established that the death of a miner was due to black lung. At present, survivors of miners who die while receiving black lung benefits or while totally disabled by the disease receive benefits without having to demonstrate a causal connection between the disease and the death. The proposed change would make the Federal statute consistent with traditional workers' compensation principles by limiting survivors' benefits to cases where death was a result of black lung and not some unrelated event. Like other changes in the proposal, this change is prospective only.

The administration proposes that black lung benefits received under the part C program be subject to an excess earnings offset. Under existing law, miner beneficiaries receiving benefits under the part B program, administered by the Social Security Administration, are subject to an excess earnings offset. This takes into account the fact that some miners are able to engage in other employment while receiving black lung benefits. This amendment would provide for a consistent offset for excess earnings of beneficiaries under both part B and part C of the act.

In addition to the proposed changes in eligibility and evidentiary standards, the administration proposes a number of other amendments to ease the burden on the trust fund and make the black lung program more consistent with traditional workers' compensation practices.

The administration proposes to eliminate lump-sum retroactive benefit payments to claimants—following an initial determination of eligibility—in those cases being contested by a responsible operator. The purpose of interim benefit payments prior to final adjudication is to avoid undue hardships to entitled beneficiaries. The elimination of the lump sum retroactive payments from these interim payments will leave this principle intact, and at the same time protect the trust fund from accumulating a significant financial liability. The proposed amendment would not relieve operators of their obligation to pay these retroactive benefits with interest after the claim was finally adjudicated.

To further ease the burdens on the trust fund and add some economic inducement to discourage unwarranted delays in payment, the administration proposes that interest charges on moneys owed to the trust fund be set at the same rate as for other overdue Federal debts. That rate is set by the Secretary of the Treasury consistent with money market conditions. The rate has been considerably higher than the present 6 percent interest charge under the black lung program.

Let me note at this point that the House of Representatives has taken action with respect to parts of our proposals, including this provision on operator interest rates. The Committee on Ways and Means, which is engaged in an effort to unify various provisions applicable to a variety of trust funds, has recommended the use of a different interest rate than that suggested by this administration. The rate would change yearly and would apply to all accounts during that year. Since the rate involved would be inordinately high if applied immediately, a transitional rate of 15 percent would apply during the first year. The Ways and Means Committee bill would also change the interest rate applicable to further advances to the fund from the Treasury. After careful examination of the impact of these changes on the affected parties and the solvency of the fund, we have no objection to these changes. The rest of the provisions of the bill reported by the Ways and Means Committee are identical to the relevant parts of S. 1922 except for technical changes associated with recodification and reorganization of the law.

I have outlined a number of proposals this morning which would insure that deserving black lung claimants are not harmed in any way, while at the same time insuring that, in the future, only cases which have been adjudicated on the basis of the best evidence are assigned to the trust fund or responsible coal mine operators for payment.

The administration is also proposing to transfer to the Fund certain cases that are now the liability of individual coal mine operators. We believe that the additional cost to the fund is justified, and it has been included in arriving at our financial projections for solvency of the fund.

The administration proposes to transfer to the trust fund the liability for claims denied and closed prior to the 1977 amendments, and subsequently reopened and approved pursuant to the special review process established by those amendments. The purpose of this amendment is to relieve operators from a significant payment burden for which the insurance industry contends coverage is unavailable. Pending State and Federal litigation has thrown into question whether insurance carriers covering black lung liability of such operators are responsible, under their insurance contracts, for the new liabilities created by the changes adopted in 1977.

This morning, I have outlined a comprehensive package of proposals which make needed reforms in the black lung program. In addition to these immediate reforms, there is a need for studies to identify the sources of income received by black lung beneficiaries. There is also a need for additional information to determine whether the state of the medical arts permits other changes in the act. The administration proposes, therefore, that the Department of Labor conduct studies to (1) focus, in consultation with the Department of Health and Human Services, on the state of the medical arts concerning the diagnosis of pneumoconiosis, and the relationship of simple and complicated pneumoconiosis to physical impairment and economic disability; and (2) provide a comprehensive review of the various programs and income sources available to persons who have contracted black lung. The findings of these studies, with recommendations regarding the need for any future legislation, would be submitted to the Congress within 18 months from the date of enactment.

Improving the financial condition of the trust fund also involves consideration of the adequacy of the existing tax structure to finance the payment of black lung benefits. I would now like to discuss our proposals in this area.

The administration proposes to raise the existing tonnage tax rates to $1 per ton for underground-mined coal and 50 cents per ton for surface-mined coals, or 4 percent of the sales price, whichever is less. The new tax rates would revert to current levels at the end of calendar year 1995, or sooner if the current debt is retired prior to that date. This tax rate, coupled with the changes proposed in evidentiary and eligibility standards, will eliminate the need for repayable advances from the Treasury after fiscal year 1985 and allow full repayment to the Treasury of accumulated principal and interest by fiscal year 1994. These dates, however, are very dependent upon the assumptions made about four crucial factors: (1) The total U.S. coal production in future years; (2) the relative proportions of total coal production accounted for by surface and underground mines; (3) the size of the debt to be retired and the average interest rate on this debt; and (4) the rate of future benefit inflation.

As this subcommittee knows, the present tax rates of 50 cents per ton for underground-mined coal and 25 cents per ton for surface-mined coal are insufficient to finance the black lung program, and massive deficits are being financed by loans, with interest, from the U.S. Treasury.

At the end of fiscal year 1981, the trust fund owed the Treasury $1.5 billion. We project that the debt will reach about $9 billion by fiscal year 1995. With no change in the law, the only manner in which sufficient revenues can be obtained to meet trust fund obligations is through continued reliance on loans from the U.S. Treasury.

Mr. Chairman, this concludes our statement. We will be happy to answer any questions that you or members of the subcommittee may have.

Senator NICKLES. Thank you, Mr. Collyer.

I appreciate the in-depth study that the administration has done and also, your earnest desire to join with Senator Randolph and myself and others in trying to come up with a solution that will try and get the fund back in shape and also provide adequate and fair benefits to those who are truly deserving.

Mr. Collyer, as I am sure you are aware, the GAO report which I alluded to earlier dealt primarily with the Social Security Administration, but I also believe they have done some work on the Department of Labor's administration of black lung, and according to what I have heard, the same type of percentages were used. In the 80-some percent bracket, they were finding that claims had been approved without apparent medical evidence of black lung disability. In view of these findings and recommendations by GAO, why doesn't the administration recommend the elimination of all the presumptions that are based strictly on years of employment?

Mr. COLLYER. We think that the presumptions that we are recommending eliminating are the ones that, as far as the major problem, we see that with the elimination of these presumptions and the other changes that we are making, we will see a reduction in the approval rate from 50 to 60 percent—I believe that is right; my program people have the numbers here.

The GAO report, as you mentioned, said that quite a number of claims are being approved without adequate evidence of total disability. However, the approvals were made under current law. It is the law that needs to be changed. And at the same time, we are making administrative changes within the Department to refine our processes of reviewing these claims, speed up our payments, adding a computer svstem that will have triggers in it that will kick out payments that seem to be in error, look for fraud and abuse in the medical community—a number of things are being put underway right at the present time.

Senator NICKLES. Under the recommendation in the bill, S. 1922, you eliminated three presumptions. That leaves which presumptions?

Mr. COLLYER. Mr. Berrington?

Mr. BERRINGTON. Mr. Chairman, only two presumptions remain in the law if the bill is enacted. The first one is an irrebuttable presumption that if you have complicated pneumoconiosis, which is the most severe kind, that that complicated pneumoconiosis is totally disabling.

The second presumption which will remain in the law is the rebuttable presumption that if a person has worked 10 years in the mines and has medically provable pneumoconiosis that he got that pneumoconiosis working in the mines.

So the bill removes the connection between having a respiratory disease and assuming that that respiratory disease is pneumoconiosis. We sever that presumption that is in the current law. The only presumption, and it is a rebuttable one, that remains in a substantive way is that if you have provable pneumoconiosis, that you got it in the mines.

Senator NICKLES. And that is what we would call simple and complicated?

Mr. BERRINGTON. Either.

Senator NICKLES. Let me ask you a question, not being that familiar with it. Can a person contract simple pneumoconiosis without being in a mine?

Mr. BERRINGTON. The definition in the law requires that the disease arise out of coal mine employment.

Senator NICKLES. Where I am targeting in is whether or not the definition for pneumoconiosis should be complicated or simple. Granted, the first presumption, given that, I think, would target directly into the mines. But where I am coming from is in the GAO report which reports of asthma, lung coughing, whether that was due to smoking, et cetera.

Mr. BERRINGTON. Yes. And that presumption does not go to a presumption that the individual has pneumoconiosis. It is a presumption that if he has pneumoconiosis, that he got it in the mines.

Mr. COLLYER. We are speaking of coal workers' pneumoconiosis.

Senator NICKLES. Well, I guess I will turn this around. Should we modify the statutory definition of pneumoconiosis to be consistent with contemporary medical and scientific understanding of the disease?

Mr. COLLYER. Yes. The whole issue of definition, we plan to study in these 18-month studies that are contained in the act. We want to take a look at total disability, what that really means and what it should mean, and the definition of a miner, who should a miner be—someone in construction, or someone who is underground, working in dusty areas. And pneumoconiosis is another word that we would want to pin down rather tightly and eliminate, if possible, all these extraneous complicating factors that do not occur within the mines.

Senator NICKLES. Mr. Collyer, as I am sure you are probably aware, Congressman Erlenborn's bill has in it, I think, the proposal to turn over the program to the States within a period of years, I think 1985 or 1986. Did the administration seriously consider that, and noting that it is not in the existing bill, decide that it would not be a step in the right direction?

Mr. COLLYER. I do not think it is a step in the right direction at the present time. The original legislation, as Senator Randolph pointed out, was minimum standards for States to follow. There were 21 States, I think, at the time who were required to put into their laws the criteria that were within the Black Lung Act. Those States have not done so yet, and in 1977, this State standards feature was removed from the act. The sunset date was supposed to have been this year, 1981; that was removed. It is a permanent program right now.

I believe that all of these things during our 18-month study will be addressed, and I firmly feel, as we do in the administration, that workers' compensation should be a State insurance program. This was one special case. It was an experiment. We have made some mistakes—we have made some mistakes here on the Hill, and we have made some mistakes down in the Department of Labor and at HHS. Hopefully, with the studies that we are about to do, we will be able to answer that question more directly.

Senator Nickles. What is the status right now? You mentioned the States, back earlier, did not have coverage for these. Do most States now have some type of black lung coverage?

Mr. Collyer. I believe Oklahoma was the last State to add it, about 5 years ago, and now they all have coverage for that disease.

Senator Nickles. And in some cases, aren't some of the State programs more generous than even the Federal program?

Mr. Collyer. In terms of benefit levels, they are, yes.

Senator Nickles. The administration's bill would apply to future claims. The social security excess earnings offset currently applies to part B Claims; correct?

Mr. Collyer. Correct.

Senator Nickles. Why not apply the offset currently to part C claimants?

Mr. Collyer. That will be done. That is part of the proposal for future part C claimants.

Senator Nickles. If such claimants are receiving black lung disability benefits and yet are still able to work and earn income, then, shouldn't their black lung benefits be offset by such earnings?

Mr. Collyer. Are you speaking of claimants who are presently on the roles—claimants presently receiving benefits is what you are speaking of?

Senator Nickles. Yes.

Mr. Collyer. We have decided not to affect anyone presently in the system and make our changes apply prospectively only.

Senator Nickles. If a person were receiving black lung disability and also social security disability right now, or some other type of disability income, there would be no offset for those individuals?

Mr. Collyer. Correct.

Senator Nickles. To restate something that was made at the opening, basically, all of your changes concerning eligibility are all prospective, all from the date of enactment forward.

Mr. Collyer. That is correct.

Senator Nickles. In other words, no individual, as it is right now, would receive any reduction in benefits; they would not go back and have the X-rays reexamined and the benefits cancelled for those individuals today?

Mr. Collyer. That is correct.

Senator Nickles. How many claims are pending now? Do you have any estimate of how many are now before the Department of Labor?

Mr. Collyer. Too many.

Mr. Dorsey?

Mr. Dorsey. At the present time, there are approximately 7,000 claims undecided before the Deputy Commissioner, which is the lowest level of the adjudication process at the Department of Labor. There are additional claims that have been initially determined by the Deputy Commissioner, now pending before the administrative law judges.

Senator **Nickles**. I was looking for that statistic, and I was thinking that I had seen some figures in the 25,000 to 30,000 number of claims.

Mr. **Dorsey**. If you will bear with me 1 second, I think I can give you——

Senator **Nickles**. I found something that said part C claims, 12,000 pending as of September 30, and then 3,800 as of September 25th under part B claims.

Mr. **Dorsey**. The figures that I have given you are the latest figures I have with me this morning. There are approximately 5,200 claims that were filed with the Department of Labor, either under part C of the act, prior to the 1977 amendments or new claims filed since March 1, 1978. In addition to that, there are approximately 1,300 claims that were originally filed under part B of the act, administered by the Social Security Administration and subsequently reviewed under section 435 of the 1977 amendments, that remain to have an initial decision.

Senator **Nickles**. In total, then, you are talking about a total number of about?

Mr. **Dorsey**. Approximately 6,600 claims that are undecided at the initial level. Then, in addition to that, there are claims that were decided by the Deputy Commissioner at the initial level, which now await review by the administrative law judges. The last report I have indicates that there are approximately 15,000 claims pending before the administrative law judges. Those claims would have either been denied initially by the Deputy Commissioner and contested by the claimants, or approved initially by the Deputy Commissioner and contested by the responsible operators.

Senator **Nickles**. Two questions. How does that backlog compare to, say, 1 year ago, as compared to what happened with the 1977 amendments?

Mr. **Dorsey**. All told, since March 1, 1978, the Department of Labor has been faced with the problem of processing over 400,000 claims. Out of that 400,000 claims, all but 6,600 have had at least an initial finding.

Senator **Nickles**. Is the backlog being diminished considerably? It sounds to me as if it has, in comparison with the data that I have seen.

Mr. **Dorsey**. Mr. Chairman, I would say yes, the backlog has been diminished tremendously. In fiscal year 1981, we received slightly over 18,000 new claims, and as I indicated, we only have 5,000 of those claims awaiting at least an initial finding, so that it means that far less than 1 year is being used to reach an initial determination.

Senator **Nickles**. Could you provide this subcommittee on numbers of claims that have been resolved and the number that are still pending, over the last couple of years, since the 1977 amendments? Give us some kind of perspective of what kind of backlog, what kind of flood of cases we have had, and what kind of progress Labor and HHS have had as far as resolving those cases. The second part of my question is what type of time do we have now in at least resolving to the first step as far as claims, as to whether or not the Deputy Commissioner would make his recommendations—what kind of time are we looking at today?

Mr. DORSEY. We believe that approximately 75 percent of the claims reach an initial finding in less than 180 days.

Senator NICKLES. How does that compare to, say, a year ago?

Mr. DORSEY. It is a tremendous improvement.

Senator NICKLES. You are still talking, basically, though, about a half-year. If you have a coal miner in West Virginia who files a claim, before he is actually talking about his probably monthly amount or whatnot, you are talking about a half-year?

Mr. DORSEY. Yes, sir, but it is very difficult to reduce the time frame much below 6 months, simply because of the time it takes to gather the necessary evidence, including the medical test results. It is very difficult to get the physicians to supply those reports in less than 30 to 90 days in some areas.

Senator NICKLES. Do Labor and HHS coordinate fairly well, as far as keeping track of figures and numbers of people who are applying, and making sure that we do not have duplication, et cetera?

Mr. DORSEY. Under the current system, the Department of Labor does enter into agreement with the Social Security Administration to take claims in those areas where the Department does not have field stations or district offices, so that the filings of the 18,000 claims that were filed in fiscal year 1981 were filed either at a Social Security Administration office or the Department of Labor office. They are combined figures, and those claims are immediately forwarded from the Social Security Administration to one of our district offices.

Senator NICKLES. Here again, I am not trying to give you a bunch of homework, but if you have some figures that are easily accessible, like the number of people who have been receiving black lung benefits to date, and how that has grown, the number of payouts—it can be kind of confusing when you start looking and yes, we are talking about B, and now we are talking about C, and then you look at the results of the amendments and statutory changes. It fluctuates considerably as far as eligibility, participants, beneficiaries, et cetera. Possibly, you could help us piece some of this together. If you would provide this committee with that for the record, Senator Randolph and I and other people who are interested could have a better grasp on how this program actually developed and evolved over the last several years.

Mr. COLLYER. We would be happy to.

Senator NICKLES. Mr. Collyer, the trust fund, unlike responsible operators, does not have the right to contest initial determination of eligibility. Does the Ways and Means proposal which deals with the trust fund and the tax retained in current law, barring a right to contest eligibility determinations?

Mr. COLLYER. It retains current law, yes.

Senator NICKLES. Don't you think that the trust fund should have a right to be able to contest those claims to protect the fund?

Mr. BERRINGTON. The Department is responsible for making judgments on cases that do not involve responsible operators. And the Department, if it is doing its job correctly, is protecting the fund. I don't believe that the GAO or anybody else has said that the Department was not following the law in making judgments even under the current law, but that the law needed changes.

We have numerous cases in which the Department's attorneys represent the Department against claimants who are appealing Deputy Commissioner decisions, and we are in the business, day in and day out of trying to protect that fund.

Senator NICKLES. I certainly did not mean that the Department was not complying with the law. I have found that to be the case, and GAO, I believe, has substantiated that. But do you think the law should be amended to where the Department would be in a better situation? I am thinking somewhat of what we are talking about doing with the second trust fund under longshore, something to give the Department greater leeway to protect the fund.

Mr. COLLYER. If you are thinking of some independent status that would be given to outside counsel to independently protect the fund, I think it would confuse the litigation process. The Department now has responsibility for protecting the fund and making the initial determination. I really do not see that that would do more than just confuse the issue.

Senator NICKLES. Looking at information given to me, it shows that the present reversal rate ranges from 35 to 60 percent. If it is being protected to that extent, why would the reversal rate be that high?

Mr. BERRINGTON. Mr. Chairman, those reversal rates come from either Labor Department administrative law judges or the Benefits Review Board, which is also part of the Department. So the process which is currently established within the Department provides for a pretty substantial review of determinations.

I should also add that many of those reversals are occurring because evidence has come into the file for the ALJ to examine, or the Benefits Review Board to examine, which was not available at the time the Deputy Commissioner made his determination.

Senator NICKLES. Can the trust fund now appeal to the ALJ or to the Benefits Review Board?

Mr. BERRINGTON. The trust fund, no, sir.

Senator NICKLES. It does not have the right to appeal.

Mr. BERRINGTON. Once the Department makes a favorable determination, then the case goes on the books for payments, unless the determination also establishes a responsible operator, a mine operator, who is responsible for paying the claim. If that is the case, then the responsible mine operator may challenge the claim, either challenging the assignment to that mine, or challenging the status of the miner as someone who suffers from pneumoconiosis.

Our approval rate right now—and I think this is fairly important in looking at the question of whether some type of conservator is necessary for the fund—our approval rate right now, under our current medical criteria, which are more stringent than the original medical criteria at the time the law was passed, have an approval of only about 11 or 12 percent—I think that is being generous in saying that the approval rate is that high. The approval rate will come down very substantially under the new law. We are talking about perhaps 11,000 or 12,000 claims per year, an approval rate of 5 percent, perhaps, of those claims. The question is whether it is appropriate to establish a whole new bureaucratic structure to deal with that small number of claims, or whether the Department and its processes, including the Benefits Review Board, can do the job.

Senator NICKLES. This is another subject, but you mentioned the approval rate now at 11 percent.

Mr. BERRINGTON. Yes, sir.

Senator NICKLES. What was it in the past, say, a couple of years ago?

Mr. BERRINGTON. Well, the approval rate has been as high as 47 percent in 1979; it was 33 percent in 1980. It is steadily coming down—just under 20 percent in 1981.

Senator NICKLES. Well, let me ask you, with this reduction in approval rates, are coal miners that have debilitating pneumoconiosis being rejected benefits?

Mr. BERRINGTON. We hope that no one who has medically proven pneumoconiosis is being rejected, assuming that that pneumoconiosis came from coal mine employment, coal worker's pneumoconiosis.

Senator NICKLES. One other question—and Senator Randolph has been very patient, and I have gone much longer than I had wanted to, but this is an administration bill and not one conceived out of a coalition of legislators. Since it is coming from the administration, I feel it necessary to dwell a little deeper than I usually do. Your projections for solvency for the fund, I think, were that it would be solvent in the year 1995, and you project continued but reduced deficit for the next 3 or 4 years, or the need to borrow additional moneys from the Treasury for the next couple of years. I assume you are guessing at coal production, you are guessing at several factors—the number of claims, the number of successful claims, et cetera. If this bill S. 1922 is enacted, if we come back 2 years from now, and we see that the lines have not changed, and instead of $480 million, next year it goes up, and it continues to go up for whatever reasons, would it be the administration's proposal to come back again and take another whack at higher and higher taxes to make it a solvent fund?

Mr. COLLYER. We do not see that happening. This projection was put together through the use of a computer model that took in the best evidence available on futures in terms of coal production and numbers of miners who might file claims. As Mr. Berrington said, the entry number of claims per year is around 12,000, yet the approval rate is down to 5 percent, that is 300 claimants coming onto the roles per year in all the States—a very minor program at that point. The major impact would be the increase in the tax on coal. I think our estimates show that it would reach solvency in 1994, although we are triggering back automatically in 1995, if we do not make it in 1994.

If there are some gross errors in the model, and we see that in 2 years, we will be back up here, suggesting changes in either eligibility or tax rates, one or the other or both.

Senator NICKLES. So part of the criteria for the model was that there would be about 11,000 claims per year, and you were assuming a 4 or 5 percent approval rate?

Mr. Collyer. Yes.

Senator Nickles. Compared to past history, that would look very optimistic.

Mr. Collyer. Yes. The program has a fairly high visibility profile. It is an attractive program because it does pay benefits to people who still are up, walking around. It probably has caused a number of people to file for the benefits because they read GAO reports as well, saying that you can get dollars and not be disabled under the law. I do not blame the people for doing it. I probably would do it myself, if I thought there was a chance I could get the money under a program that Congress had approved, and I did not have to be disabled and I could continue my work. I probably would file, and there are numbers and numbers of these people filing. And I think, once the word gets out that the law has been changed and it is no longer available, and there is no penalty for filing, I think we will see that drop off significantly.

Senator Nickles. I would hope that your assumptions are correct. I would hope that we would not have even 300 miners a year contract black lung disease, but those that do, I think, should be adequately compensated, preferably on a State program, from my vantage point—but yet, adequately compensated from where remains to be seen. But hopefully, your projections will be correct. I am concerned that possibly they will not be, and that a couple of years from now, instead of looking at 4 or 5 percent, it will still remain much higher than you or I have on our figures, and we will find that the tax increases that we are discussing will be paid by consumers and grossly inadequate, and we will still be here, facing a similar problem a couple of years from now.

Thank you very much.

Senator Randolph, did you have some questions?

Senator Randolph. Yes, thank you very much, Mr. Chairman.

Mr. Chairman, I want you not to feel that I am waiting, hoping that you will stop and I will begin. I want you, as you are doing, as you will do as chairman of the subcommittee, to move into these matters not only of questioning, but of probing in the very important matter that is pending before the committee. My effort will be to cooperate with you and with other members of the subcommittee.

I did mention that Oklahoma was a State, one of the States, that receives through black lung payments moneys under the legislation enacted by the Congress. I checked that, and I determined that the approvals for black lung disease in Oklahoma, to apparently a date near the present, have been 3,372. Now, the amounts that have been paid to miners and families and survivors on a monthly basis have been at the rate of about $741,000. I am not attempting to use Oklahoma as an example, because as I indicated, those who receive the black lung payments are in every State of the Union, and sometimes, we are inclined to think—and it has been stated to me in letters, focusing on the fact that West Virginians are receiving something that is conceived in the beginning for them, or for another coal mining State, and therefore, that the benefits move into that State or area.

I want to recognize, not in any manner of pleasantry, but I know that Mr. Berrington, Mr. Collyer, Mr. Dorsey, and Mr. Voytek are knowledgeable in this field, and they come to help us, not only to give statements, but to answer questions, as you have asked questions.

So for you, Mr. Collyer, and perhaps for others with you, I ask certain questions, but I may direct them at you and then your associates perhaps might make contributions.

Mr. Collyer, how many persons are receiving black lung benefits? Is it possible for the record to break that down into the miners, into the widows and into the dependents? And if you could, you might make it applicable to West Virginia—if not, to all the States. Could you answer that for the record—not that you might have it just at this moment—but for the record, I would like to have that made a part of the hearing process.

Mr. **Collyer**. Mr. Voytek will give you the national numbers. We will have to provide the State numbers later on this afternoon, if we could do that.

Senator **Randolph**. It is agreeable to answer the question in the way that you feel makes it responsive to what I have asked.

Mr. **Voytek**. Senator Randolph, at the end of fiscal 1981, there were approximately 85,000 claimants receiving black lung benefits. Of these, 72,000 were trust fund cases; the other 13,000 cases were RO cases, receiving interim benefits. Within the trust fund number of 72,000 cases, approximately 24,400 of those were widows. The other 47,400 were living miners.

Senator **Randolph**. Then, we might say that widows whose husbands have died—maybe this is not the correct way to say this—but the number of widows receiving the payments are about one-half or a little more than the miners who are receiving assistance. Is that correct?

Mr. **Voytek**. Yes, sir.

Senator **Randolph**. Would it follow that the widows, then, of diseased miners—that that number runs about 50 or a little over 50 percent of the total individuals receiving assistance in any one year?

Mr. **Voytek**. As of 1981, that was the composition of the payment role.

Senator **Randolph**. That is the breakdown that is more or less one of continuity?

Mr. **Voytek**. Yes. That is as of 1981, and over time, the widow percentage will become larger.

Senator **Randolph**. Yes; that is correct.

Could you, Mr. Collyer, or your associates, give us the number of claims that you feel, based on prior years, may be filed in fiscal year 1982, and if you could, what perhaps might be the approval rate?

Mr. **Collyer**. We would expect in fiscal 1982 approximately 12,000 claims to be filed, and the approval rate, 5 to 7 percent of those, under the new law—if the law is passed.

Senator **Randolph**. The figures of claims filed since the beginning of the program, the rates and the projections for the future, whatever you have that would fall into that category as a part of the record, could you supply for our subcommittee?

Mr. **Collyer**. Claim filings by year and approval rates?

Senator **Randolph**. That is right.

Mr. COLLYER. OK, fine. We will have to bring that to you.

[The following was received for the record:]

Senator RANDOLPH. Now, do you expect that there could be substantial savings from the proposed changes in eligibility—that is, the criteria that we are thinking of in future projections for outlays from the black lung disability trust fund? And you might even specify some of these savings that you think are just inherent or natural to flow from a program that has been so long in being.

Mr. COLLYER. Do you mean with the enactment of this legislation, the savings that would accrue from eliminating some of the rebuttable presumptions that we mentioned?

Senator RANDOLPH. Yes—hooking it, of course, with what has happened in the past.

Mr. COLLYER. Surely.

Senator RANDOLPH. And if that is difficult to supply now, it could be provided for the record being made by the chairman and other members of the subcommittee.

Mr. COLLYER. We will be glad to prepare an exhibit showing that.

Senator RANDOLPH. Mr. Collyer, we come to the matter of X-ray re-reading. I want to veer off a little before I ask these questions. At the very beginning of the program, payments were made only when pneumoconiosis, or black lung, could be proven by X-rays. Then, later, we realized that that was not enough—at least, some of us felt that that was inadequate. And we began to think that when the miner had had pulmonary or respiratory diseases, that they could be associated with black lung. I just step back to indicate that that was one of the concerns as we began to make changes. That was substantiated, at least in degree, by surgeons, by physicians, by doctors who were familiar with this subject.

In connection with the X-ray re-reading, this administration proposal provides that the Department of Labor would no longer be prohibited from a re-reading, is that correct, of the chest X-rays?

Mr. COLLYER. Yes.

Senator RANDOLPH. And I think that is proper; indeed, I do. You have said that this does not mean that claims will be decided solely on the basis of X-rays—and that is why I have given that earlier background, when it was in the beginning.

How can you assure that that will be done?

Mr. COLLYER. We will use the expert reading of the X-rays to simply add to the best evidence that we can gather concerning the approval of the claim.

Senator RANDOLPH. Thank you.

Now, the medical evidence and the state of the art, to use that expression, which perhaps is wrong, on the diagnostic techniques that are used, how do these relate to black lung? And I will say before you answer, isn't it true that not all coal dust-induced respiratory impairments—and we will say those are known generically as black lung—show up on X-rays.

Mr. COLLYER. That is correct. A number of refining techniques have been developed since 1969 to determine the presence of black lung disease, expensive efforts—blood gas studies and respiratory pressure measurements and that sort of thing all go together to come up with a diagnosis.

Senator **Randolph**. Now, the words, "tighten up," have been used once or twice today, and understandably so. How can we tighten up the eligibility criteria, from the standpoint of you and others who administer or have administered this law?

Are there changes that you can make by regulation, rather than, we will say, by new legislation? I am not wanting to press that point. You can review proposals and make changes, but you might discuss that in view of the pending bill.

Mr. **Collyer**. Well, I will start by saying that we can tighten up our own procedures within the Department in terms of handling and processing the claims themselves, making sure through our computer programs, as I mentioned a few minutes ago, that we do not let fraud, waste, and abuse enter the program as it has apparently done in a few areas on the part of the medical community; make sure that we do not make payments which are in error on our part, of automatic triggers within the computer program that prevent those kinds of errors being made. This would tighten up the program from an administrative standpoint.

Mr. Berrington?

Mr. **Berrington**. We need to have the legislation in order to remove the presumptions which are currently in the law that we believe are no longer necessary and are no longer appropriate. We need the legislation in order to give us the authority to, re-read the X-rays. There are various other items within the legislation that we can only get through legislation, which is why we are proceeding with it.

Senator **Randolph**. In a sense, Mr. Berrington—and correct me if I am wrong—you are saying that it is not your purpose to deny the claimant; it is your position and your associates' and those who work in the program to see to it that each claimant in any of the categories that I mentioned, that they receive assistance if the record shows they deserve it; is that correct?

Mr. **Berrington**. Absolutely, sir.

Senator **Randolph**. I think that is valuable for our record. When we touch unrelated death benefits, why, I think it has been stated that the administration proposes that these benefits for payments to survivors can be paid only where it can be established that the death of the miner was due to black lung. Now, how can you make that determination? What medical conditions and evidence would you consider? Will examination of conditions of heart and pulmonary functions be evaluated? How can you make what I would call a causal connection between the disease and death?

Now, if I have oversimplified, I do not want to do it. Would you have comment?

Mr. **Collyer**. Surely. We would certainly accept medical evidence that the death was caused specifically by a heart attack which was occasioned by the black lung disease. The only kinds of things that we are trying to put out of this law would be if the miner is run over by a truck or some other completely unrelated accident—any other condition that was triggered by the black lung disease which causes death would be, in our eyes, compensable.

Senator **Randolph**. The running over by a truck, for example, are you differentiating whether the truck was running over the miner on, let us say, the coal mining property, or out on the highway, 20 or 30 miles away? Does it make any difference?

Mr. **Collyer**. Out on a hunting trip only. If it happened on the mine property, why, then, certainly, it would be a compensable accident, or even under the State law, yes.

Senator **Randolph**. Well, I do want to say, and the miners would want me to say this, that they are people who love to hunt deer, as you know, in the mountains. They go out, and they really work at it. And one thing I want to say is that no matter how many deer are killed each open season in West Virginia, apparently, the next season, there are more deer than ever. Maybe we ought to put you in charge of taking on that and see what is the cause.

Mr. **Collyer**. I would like that assignment. It is a beautiful State.

Senator **Randolph**. Well, as I conclude on this subject, what will be the procedure for a prospective widow to prove that the death of a miner was caused by black lung—just sketch that.

Will the benefits accruing to her be automatically terminated, and she must, in effect, make a new claim? What is the process?

Mr. **Berrington**. Senator Randolph, there would be of necessity a new claim. We would entertain medical evidence, physician's report, other experts, evidence about the specific cause of death and whether the death was related, and ultimately caused by the pneumoconiosis. Widow claims would receive very, very high priority so that they would move very quickly through the system, to minimize any possibility of disruption in benefits, assuming that the death was related to black lung.

Senator **Randolph**. What you are saying is helpful to me, and I am sure will be helpful to the members of our subcommittee.

When we come to the Labor Department, we have, certainly, some critical questions because in that agency involved in an effort to eliminate the deficit in the amount of coal mined, there is that question that is raised. Are you prepared to give us the tonnage figures on which your revenue estimates are based, and how do you come by those figures, and are these figures the same figures projected by the analysis by the United Mine Workers of the trust fund?

I am not saying you can give that today, but would you be able to help us by supplying that for the record?

Mr. **Collyer**. We will supply it for the record, Senator.

Senator **Randolph**. Thank you.

Mr. Chairman, I will conclude with this question. There is the problem of transfer of claims. And the proposal is to transfer certain cases from responsible operators to the trust fund. Now, I think the committee should be told in language that will be helpful for those who are trying to find answers, what are the claims, what are these claims; could you describe them? How many are there, presently? What is the breakdown among responsible operators, for these claims, and who are the responsible operators, and by what criteria?

If you do not have these figures, specifically, I can understand. Are these concentrated in what we call large corporate structure companies? Are they the small operators, as we have them, maybe in West Virginia, with the employment of 30, 40, or 50 miners, rather than 600 or 700 miners?

This analysis, I think, would help us within the committee study. If we could have those court cases that are pending brought to us.

If I am asking some questions that seem a little too definitive, I do not want to be misunderstood. I think you are the people who have this information. Now, what is the benefit to the operators in dollars of removing these claims to the trust fund, rather than allowing the decisions to be made in the process of the courts, themselves? What is the benefit to the Government if such action is or were to take place?

I thank you very much. I know that you will not so much come to grips with these questions, but you will look back, check the records, and supply the information.

Mr. **Collyer**. We would be happy to provide that information to you, Senator.

Senator **Randolph**. Thank you.

Senator **Nickles**. Senator Randolph, I think your questions and requests for additional information regarding the transfers and the value of the transfers and also the implications that that has on the fund, as well as the employers, et cetera, is very, very well-taken and it is one that we will be looking very closely at.

Just one additional comment on this scale or economic model that we are trying to look at. Staff has given me the estimate of approval of new claims to make this thing feasible to pay. It shows 4 percent from 1980 out, which seems a little presumptive, to use 1980 and 1981, when you had approval rates of, I think you mentioned 30 percent in 1980 and 11 or 12 percent in '81.

Gentlemen, we thank you very much, and we will be probably submitting some additional questions, so if you can give us the information as requested by Senator Randolph and myself, I think it will be very helpful to us as we further consider this legislation.

We do appreciate your input and look forward to working with you as we work on this legislation through the Senate.

Thank you.

Mr. **Collyer**. Thank you, Mr. Chairman.

Senator **Nickles**. Our next witness today is John Erlenborn, Congressman from Illinois.

I might advise the future panelists that it appears to be necessary for Senator Randolph and myself both to be gone from the period of about 12 until 1 o'clock. So Congressman, if you would prefer to testify before we go and then come back, or if you would prefer to come in later, we would be happy to accommodate your schedule, but we have a meeting that is crucial for us to participate in.

Mr. **Erlenborn**. Senator, I would like to try to conclude my testimony now, if I might, before you have to leave.

Senator **Nickles**. We would be happy to. And for your information, I will let you know that I have studied your statement, and I wish to compliment you for the work that you have done in this program, in trying to keep it a sensible program.

Your statement is one of the most complete statements, I think, that I have seen since I have been in the Senate, concerning a particular piece of legislation, its involvement, and also some possible amendments to make it better.

Your entire statement—as will the statements of all of our panelists today—will be entered into the record in full, as if read. So with that, if you would care to summarize, you are free to proceed.

STATEMENT OF HON. JOHN N. ERLENBORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. **Erlenborn**. Thank you, Mr. Chairman.

First, let me say I enjoyed being here to listen to my friend, Bob Collyer, present the administration's position. I think he put as good a face on the position they have taken as possible.

I also want to thank the chairman for having these hearings and giving me this opportunity to testify, because it apparently may be the only opportunity that I have to speak on this subject, either on the floor of the House, during debate on this important bill, or in our committees. In spite of the assurances that I have received repeatedly over the course of the past year from members of the administration and representatives of the coalition supporting the bill that is under discussion, that it would go through the normal channels and we would have the opportunity to have hearings in the House, present the bill on the floor in general debate and offer amendments, it appears at the present time that a truncated bill dealing only with the tax aspects will be considered by the House, will be brought up tomorrow under a procedure where debate will be limited to 20 minutes, no amendments will be allowed, and that then, the real substance of the bill will be added here in the Senate, thereby bypassing the House and bypassing my Committee on Education and Labor.

Senator **Nickles**. Excuse me, Congressman. Could you repeat the scenario as it is developing, and what you thought would happen in the House and in the Senate?

Mr. **Erlenborn**. Yes, Senator. A bill has been reported by the Ways and Means Committee that has only the tax aspects of the administration's proposal. It will be brought to the House tomorrow under suspension of the rules, allowing only 20 minutes of general debate on each side. No amendments will be in order. If the bill is passed and comes over here, it is my understanding that then the real substance of the bill will be added here in the Senate, and it will no doubt be the intention of the Chairman of our Education and Labor Committee, who is very much interested in this bill, to then accept the Senate amendments, thereby, effectively bypassing the floor of the House and the House Education and Labor Committee from having any real input through general debate or an opportunity to offer amendments—a most unusual decision being made by the chairman of our committee, since black lung matters are so close to the heart of Carl Perkins that he would allow our committee to be totally bypassed and not have any opportunity to take part in the consideration of this most important bill.

Senator **Randolph**. Could I interrupt, Mr. Chairman?

Senator **Nickles**. Surely.

Senator **Randolph**. I do want to say for the record—it is not just cursory comment—but there is no Member of the House that I can remember who has had as much indepth consideration of this whole subject matter as has the Congressman. And we have not always agreed on these matters in years past, but you were informed, and you were attentive, and your were knowledgeable, and I want the record to show that.

And I would ask this question. Do you mean that the Ways and Means Committee is divorced from any work in this matter?

Mr. **Erlenborn**. Divorced, no, Senator. The Ways and Means Committee has entertained the tax bill. That bill has been reported. No consideration has been given in that committee or in the Education and Labor Committee to the substantive changes in the black lung program that have been proposed by the administration and are the subject of the hearings today—no attention in the House in either committee.

Senator **Randolph**. And could I ask our chairman what understanding have you, Senator Nickles, about any, let us say, action within the Finance Committee in the Senate on this subject?

Senator **Nickles**. Senator Randolph, I think from a very brief discussion this morning with Mr. Collyer, they were still trying to come up with a vehicle to where this legislation could be passed, this week. I related to him that I thought it would be impossible to do. However, as outlined by Congressman Erlenborn, they have passed the Ways and Means bill. They were going to have that come over to the Senate and hopefully have this bill be a substitute for going to conference, adopt the conference, and basically have it signed within a couple of days. I really do not know whether or not that full scenario can and will take place.

Senator **Randolph**. I thank you very much.

Thank you, Congressman.

Mr. **Erlenborn**. Mr. Chairman and members of the committee, Senator Randolph, I thank you for this opportunity to discuss the black lung program. 3½ years ago, I had the opportunity to appear before your Subcommittee on Labor to oppose the black lung benefits reform bill that was being hastily herded through the 95th Congress. Fortunately, the major provisions of that bill, the entitlements based on years of mining, were eliminated.

Unfortunately, the bill which eventually emerged as the Black Lung Benefits Reform Act achieved even more liberal eligibility criteria than the original bill. Unfortunately, as well, I am appearing before you today to oppose the limited extent to which corrections are being made in the black lung program by the bill introduced by Chairman Hatch, joined in by Senators Randolph, Heinz, and Nickles.

These corrections, frankly, are largely cosmetic.

My appearance is not to oppose the bill, S. 1922. I am here to suggest that this committee should take this opportunity to consider changes in the law which would make the black lung program a true total disability workers' compensation program, fulfilling the original promises of its sponsors.

In 1969, when the Federal Coal Mine Health and Safety Act was reported from the Education and Labor Committee, and when it was passed by the House of Representatives, I voted for it. That bill, as reported by the committee and as passed by the House, provided compensation for those who had progressive massive fibrosis or complicated pneumoconiosis, which, under International Labor Organization standards existing at that time, and today, is considered disabling. At the time I considered this to be the proper thing to do, because miners disabled by pneumoconiosis had not, and did not then, qualify for workers' compensation under State law. The Senate bill also provided compensation to those miners who were totally disabled. In conference, strangely, the references to complicated pneumoconiosis and total disability were removed, and simple pneumoconiosis made compensable. Therein began my disenchantment with the black lung program.

The 1969 program envisioned limited Federal responsibility and was not intended to establish a Federal precedent, but was in the nature of a special compensation plan.

Despite assurances that a "one-shot" total disability compensation program was the intent of Congress, in 1972, amendments were enacted liberalizing the eligibility criteria providing for additional eligible survivors, providing for "unrelated death" benefits and generally extending the Federal responsibility for an additional period of time. The 1972 amendments so departed from the original promises that they even provided that claims could not be denied on the basis of a negative X-ray.

Not only were the assurances of a "one-shot" disability program violated by the 1972 amendments, but a "third shot" was fired in 1977, reaching its target March 1, 1978, when the 1978 amendments became law. Although the 1978 amendments did not contain a pension program based on years of mining service, they were actually worse.

They so liberalized eligibility criteria that compensation could be awarded to most miners and their dependents and survivors whether or not the miner had any medical evidence of the disease.

Mr. Chairman, I have repeatedly stated, and I wish to continue to emphasize, that I support without reservation the right of a coal miner, totally disabled from pneumoconiosis, to receive black lung benefits. The bill you are considering takes only one small step in this direction, but fails to reach the real problems and misconceptions of the existing program.

Mr. Chairman, black lung is a legislatively defined term. The present act defines pneumoconiosis as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. Consequently, the act's definition includes diseases found in the general population such as bronchitis, emphysema, and other respiratory conditions which may be caused, or aggravated, by cigarette smoking or other environmental conditions.

Over the years, certain testimony on the black lung program which has been accepted by the supporters of the present program has equated coal workers' pneumoconiosis with total disability. That accepted testimony is simply incompatible with fact.

Mr. Chairman, it is possible to have simple pneumoconiosis and no impairment whatsoever.

In recent testimony before the Subcommittee on Oversight, House Committee on Ways and Means, July 27, 1981, Dr. Millar reported on NIOSH's surveillance program, round two, which showed that 94.2 percent of the miners studied had no evidence of coal workers' pneumoconiosis; 4.5 percent had simple category 1, and only 0.9 percent and 0.1 percent had categories 2 and 3, and 0.12 percent had progressive massive fibrosis.

Some of the results of the third round of examinations in the national coal workers' health surveillance program were also reported. In that preliminary report of round 3, over 95 percent of those examined had no evidence of the disease, over 3 percent demonstrated category 1, and no statistically significant number had advanced stages of this simple form of the disease or the complicated form of the disease.

With these figures in mind, despite the low percentage of miners with the disabling stage of black lung, the General Accounting Office reports that from 1969 to December 1980, the Social Security Administration has paid over $9 billion in benefits to almost 400,000 claimants, out of 537,000 miners and survivors who filed claims.

Senator **RANDOLPH**. Mr. Chairman, could I interrupt?

Senator **NICKLES**. Yes.

Senator **RANDOLPH**. Representative Erlenborn, I understood that we would meet from 10 o'clock until near 12 noon today. I have an appointment that is such that I must go. I will read your testimony very carefully, and I hope that even you may, perhaps, counsel with us later on some of these matters. But I do not like to leave during your testimony, but I must do so, and the Chairman I know understands where I must go at this time.

Thank you.

Mr. **ERLENBORN**. I fear maybe Senator Nickles is under the same constraints. I understand you must leave. Let me just say that I am willing to answer whatever questions you might have at the proper time or to return, if you have any further hearings I hope maybe next year, you will, so that this bill will not be rushed through.

Let me also say that the fact the administration and the United Mine Workers and the coalition are recommending these changes is rather persuasive that changes are necessary. I would suggest that you look at the application of these charges to pending claims, not only those that are filed in the future. If you do not make them applicable to pending claims, the changes will be cosmetic and have very little effect on the liabilities of the black lung trust fund.

Senator **NICKLES**. Congressman, I think that your last statement was very well put, and one that I would concur with.

It is necessary for Senator Randolph and myself to attend a very important meeting, and I wonder if it might be possible if you could join us sometime later this afternoon. We would be happy to try and squeeze you into the program at the time most suitable to your convenience. There are many questions that I would like to expand on, if that might be possible.

Mr. **ERLENBORN**. Whatever time you say.

Senator **NICKLES**. Well, it is my intention now to recess until 1 o'clock. If you can join us at that time or at any other time, we have four additional witnesses—I do not expect any to be as lengthy as the administration witnesses. But we will be happy to accommodate your schedule and would certainly appreciate it if you could be so kind as to give us another 20 or 30 minutes, because I do have some questions. Your input is very much needed, I think, in the hearing that we have today.

Mr. **Erlenborn**. I will be here at 1, Senator.

Senator **Nickles**. We will recess at the call of the Chair.

[Whereupon, at 12 noon, the subcommittee was recessed, to reconvene at 1 p.m. this same day.]

[Whereupon, at 1:15 p.m., the subcommittee reconvened, Hon. Don Nickles, chairman of the subcommittee, presiding.]

Senator **Nickles**. We will reconvene.

Congressman Erlenborn, I appreciate your cooperation with this subcommittee in allowing us to have this break. I again apologize for it, and we very much appreciate, again, to repeat, the expertise and input that you have had on this legislation in the past years, and I look forward to working with you in the years ahead.

Mr. **Erlenborn**. Thank you, Mr. Chairman. I will try to pick up where I left off in my summary of my statement. For your benefit, I believe that is on about page 7.

Senator **Nickles**. Thank you.

Mr. **Erlenborn**. Mr. Chairman, earlier this morning, I outlined some numbers about claims. My next paragraph refers to the report of the General Accounting Office, which has already been mentioned this morning. The GAO found that in 88.5 percent of the cases where social security granted awards, medical evidence was not adequate to establish disability or death from coal workers' pneumoconiosis.

Departing from the statement for a moment, though the report has not yet been issued, in testimony before the Ways and Means Committee in the House, the GAO said that in a similar study of Department of Labor-allowed claims, 84 percent of the claims allowed were without adequate medical evidence of disability.

These statistics and these findings by the GAO, the National Academy of Sciences and NIOSH demonstrate the need to revise drastically the black lung program. I have introduced a bill, H.R. 4387, to bring the black lung program closer to a real disability program. However, I do not believe the bill being considered today, S. 1922, will accomplish that result.

Although both the National Coal Association and the United Mine Workers of America are supporting this legislation, I am skeptical of its results. In the course of almost 25 years as a legislator, I have come to the conclusion that whenever business interests and the unions get together and agree on something, we should look very carefully to see if the taxpayer and consumer has been forgotten. He usually has.

First and foremost, S. 1922 is prospective only. Every amendment to the black lung program as it affects eligibility applies only to those claims which will be filed in the future. There are areas of the bill which should be applied to present claims.

For example, to save an enormous amount of money and to be compatible with a disability program, certainly offsets should be applied to present claimants. Further, awarding future benefits to potential widows or survivors of living claimants should be stopped unless there is medical evidence of disability caused by coal workers' pneumoconiosis in the living miner. There are ample resources for presently living miner claimants to establish coal workers' pneumoconiosis and disability through the black lung medical program and free chest X-rays. This change would eliminate payment for deaths unrelated to coal workers' pneumoconiosis, with potential considerable savings down the road. And I might again, departing from the statement, say that I am advised that if given time, the American Thoracic Society would supply a letter supporting the legislation that I have introduced, and spelling out that modern medical diagnostic techniques can diagnose coal workers' pneumoconiosis. Thus, with the proper definition of the disease and definition of miner, and the new, more accurate diagnostic procedures, claims would be reduced substantially.

Furthermore, provisions of the bill should be applied to pending claims, that is, claims already filed but not finally adjudicated. If S. 1922 becomes law, there will be two classes of claimants—those who filed before and those who filed afterwards. When the two classes are established is relatively unimportant, except that continued awards to those who are not medically disabled should be stricken as soon as possible.

By removing certain presumptions—411(c) (2) and (4), and entitlements, 411(c)(5)—the bill takes a step in the right direction. However, as noted above, their elimination should apply to pending claims as well as future claims. Particularly unnecessary is the extension of 6 months to allow widows to file claims under the 411(c)(5) entitlement provision. As the United Mine Workers of America in their journal state, "Elimination of this provision is expected to have little or no impact, since nearly all of the survivors eligible under this presumption already have applied." The 6-month grace period only allows the United Mine Workers to canvass the ranks to encourage additional filings for wholly unmeritorious disability claims.

The removal of the 10-year death presumption, 411(c)(2), and the 15-year negative X-ray presumption, 411(c)(4), are mere window dressing, without a change in the definitions. There is nothing in the bill to prohibit these presumptions from being published as regulatory standards by future administrations. Changes in the definitions of "pneumoconiosis" and "total disability" would eliminate that possibility.

Particularly troublesome is the proposal to transfer approximately 10,200 claims from responsible operators to the trust fund. The equity theory behind the transfer provision has merit since the 1978 amendments imposed liability where it may not have been expected, but the result creates even greater inequity.

The majority of those 10,200 claims are subject to controversion by responsible operators. The trust fund, however, cannot contest a claim. As the United Mine Workers in their journal state, "Controversions by responsible operators against those claims, therefore, would cease upon enactment. Beneficiaries of those claims would be placed on the rolls for life." No wonder the United Mine Workers supports this provision.

The law now allows affidavits to establish disability in the case of a deceased miner where there is no relevant medical evidence. The bill proposes to strike the use of affidavits by a potential beneficiary. This is, at most, another cosmetic change. Even the United Mine Workers agrees that this provision accomplishes nothing of substance. They say: "This change should have little impact for two reasons: most claims in the future should have sufficient medical evidence to establish a claim, and widows should have no trouble locating someone who will file an affidavit stating that her husband suffered from respiratory problems." I agree. For the reasons stated by the United Mine Workers, affidavits should be prohibited altogether.

Earlier, I referred to X-ray rereading. The present law prohibits the rereading of X-rays and prohibits the denial of a claim on the basis of a negative X-ray. The bill proposes to allow rereading of X-rays. The bill also proposes to do away with the presumption which encompasses the language which prohibits the denial on the basis of a negative X-ray. But the explanation to the bill promises that, "This change in no way implies a policy of disapproving claims solely on the basis of a negative X-ray." The result would be that an X-ray could be re-read. A negative X-ray still would not be evidence to deny a claim for coal workers' pneumoconiosis.

Another issue in the eligibility area that needs correction is the offsets. Present law only allows offsets—that is, reduction of black lung payments—for other disability awards "due to pneumoconiosis." Under part C widows' or survivors' benefits are reduced, but under part B, there is no offset for death benefits. The words, "due to pneumoconiosis," means that other disability awards under State or Federal programs do not reduce the black lung awards. A miner can be getting State disability and black lung benefits without an offset, or he may be getting State disability compensation, social security disability, or social security retirement and survivors' insurance and black lung benefits without a black lung offset.

I might, as an aside, say that this leads to the terribly inequitable situation where a miner who is injured in a roof fall and becomes a paraplegic or a quadraplegic, who gets disability compensation from the State, as well as social security disability, does have an offset under current law, and will receive much less in disability compensation than one who may have lung dysfunction from smoking, who qualifies for black lung benefits and then also gets social security disability and has no offset whatsoever. So that the more seriously injured miner from traumatic injury gets less compensation than some of these black lung claimants.

There are now 91,000 persons getting some form of title II social security and part B benefits. Of that 91,000, about 63,000 are getting part B and retirement and survivors insurance; 23,000 are receiving part B and social security disability and are under age 62; and 5,000 received both the latter benefits but are between 62 and 65 years of age.

Mr. Chairman, I earnestly believe more than cosmetic changes should be made in the black lung program. The principal reform should be to fulfill the original promise and allow the States to assume responsibility for workers' compensation for disability due to pneumoconiosis, the same as States cover other occupational diseases. I have introduced H.R. 4387, which does so. For your consideration, I will briefly summarize my bill.

H.R. 4387 narrows the definition of pneumoconiosis since the present definition has been interpreted to include such conditions as emphysema, which is not a chronic dust disease of the lung, and lung cancer, which has not been shown to be related to coal workers' pneumoconiosis. In addition, the bill excludes sequelae, thus excluding unrelated lung conditions.

The present definition of "miner" includes anyone who has worked around a mine, in transportation or even in construction. The Benefits Review Board has allowed a claim of a laboratory analyst who worked in the lab, analyzing coal. There is no evidence that thse people suffer any increased likelihood of developing coal workers' pneumoconiosis. H.R. 4387 amends the law to define miners as those who have been employed directly in the mining—extraction—of coal.

In order to keep definitions in different Federal laws parallel, H.R. 4387 amends the definition of "total disability" to be compatible with that of the Social Security Act. To collect benefits for total disability, the claimant should be unable to perform any work. The definition of total disability applied by the Social Security Administration requires proof that the claimant cannot "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment."

H.R. 4387 also restricts the use of the present presumptions in the law and strikes the 411(c)(2) and 411(c)(4) presumptions and the 411(c)(5) entitlement. It is really necessary that proof of the existence of black lung disease be required before any presumption is raised, and the bill does this. Besides, if there is medical evidence that black lung disease does not exist, the bill provides that a presumption cannot be used to establish a claim.

H.R. 4387 removes the "unrelated death benefit" provision. Presently, if a miner who is entitled to benefits dies from any cause—even a cause completely unrelated to his pneumoconiosis—his eligible survivors are entitled to benefits. This amounts to a life insurance program and not a compensation program, and should be repealed, which my bill does.

I might say, Mr. Chairman, again as an aside, that this provision would parallel what you and I are trying to do in the Longshoremen's and Harbor Workers' Compensation Act, by removing unrelated death benefits.

Black lung benefits are presently offset only by benefits from a State black lung program. They are not offset by workers' compensation benefits from any other program. This means that for benefit purposes, a worker can be disabled twice—an irrational concept. H.R. 4387 amends the statute to permit the offset of black lung benefits by any other workers' compensation benefits.

One more aside. I asked the General Accounting Office some years ago to examine how many workers may be drawing State, as well as Federal, black lung benefits. The answer was that nobody had ever looked, neither Social Security nor the Department of Labor, and they were not certain that they had a method to find out who was drawing illegally these double benefits.

Since an X-ray is one way of proving or disproving a claim, the bill also allows the denial of a claim based on negative X-rays and strikes the provision that does not allow for the rereading of X-rays. If the program is to be placed on a sound medical basis, the best available medical evidence should be sought and allowed. Presently, claims may be denied or allowed based on a totally inaccurate reading of X-rays. H.R. 4387 will correct this inequity.

The present law allows an affidavit to be sufficient where there is no medical or other relevant evidence. That means those who will benefit can submit an affidavit that a miner had a cough and can receive benefits. This provision is probably one of the most important reasons the GAO concluded that 88.5 percent of the random sample of claims are not supported by medical evidence of disability. It is a provision encouraging fraud. Because of its total inappropriateness, H.R. 4387 strikes this affidavit provision. The bill further strikes the provision requiring the Secretary to accept an autopsy report. That does not mean the Secretary cannot accept an autopsy report; it just means the Secretary does not have to accept all autopsy reports submitted.

One of the original promises of the black lung program was that it would be a temporary Federal program. However, despite vast improvements in State programs and benefits, no State program has yet been approved. This is in part because the black lung statute requires the States to adopt standards similar to the Federal law for the determination of the existence of the disease and the definition of disability, and to automatically provide widow's benefits without proof that the miner's death was the result of pneumoconiosis.

My bill totally terminates the Federal program from processing new claims after the fifth anniversary of the 1978 amendments—that is February 28, 1983. This is compatible with the original promise that the black lung program was to be a temporary supplemental program.

Presently, benefits payable from the trust fund are not subject to being contested by either operators or the trust fund. H.R. 4387 establishes a special counsel in the Department of the Treasury in order to controvert claims that are the responsibility of the trust fund. By being able to protect the trust fund from ineligible claims, it is hoped that moneys from the Federal Treasury will be saved. Although the trust fund is financed by a tax on coal, the trust fund is now insolvent, with continued projected insolvency, and the trust fund must borrow against general revenue funds. These funds should be protected, and the Office of Special Counsel will do that.

The present 50-cent tax per ton on underground coal and 25-cent tax per ton on surface coal is inadequate to fully fund the trust fund. My bill changes that tax to 3 percent and 1 percent of the price at which coal is sold by the producer of underground and surface coal, respectively. Projections by the Department of Labor in early May show such a tax would make the trust fund solvent in the year 1986.

In summary, I believe that a doubling of the present tax rate, which now pays benefits for the nondisabled, as well as for disabled, miners requires more than a cosmetic change. Any 100-percent increase in taxes, as proposed in S. 1922, demands true reform.

One last comment, Mr. Chairman. I know that you have joined with me in being disturbed when we hear of claims of cost overruns at the Defense Department, sometimes 100 or 200 percent. Just for comparison purposes, I might point out that this black lung program, estimated in 1969 to never cost more than $50 million per year now costs well over $2 billion per year, which is a 4,000 percent cost overrun.

Thank you, Mr. Chairman.

[The prepared statement of Representative Erlenborn follows:]

Statement by
John N. Erlenborn
Member of Congress from Illinois
before the
Subcommittee on Labor
of the
Senate Committee on Labor and Human Resources
December 14, 1981

BLACK LUNG BENEFITS PROGRAM

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to discuss the black lung benefits program. Three and one-half years ago, I had the opportunity to appear before your Subcommittee on Labor to oppose the Black Lung Benefits Reform bill that was being hastily herded through the 95th Congress. Fortunately, the major provisions of that bill, the entitlements based on years of mining, were eliminated.

Unfortunately, the bill which eventually emerged as the Black Lung Benefits Reform Act achieved even more liberal eligibility criteria than the original bill. Unfortunately, as well, I am appearing before you today to oppose the limited extent to which corrections are being made in the black lung program by the bill introduced by Chairman Hatch (Mr. Randolph, Mr. Heinz and Mr. Nickles). These corrections, frankly, are largely cosmetic.

My appearance is not to oppose the bill, S. 1922. I am here to suggest that this Committee should take this opportunity to consider changes in the law which would make the black lung program a true total disability workers' compensation program, fulfilling the original promises of its sponsors.

Black Lung Benefits Program

In 1969, when the Federal Coal Mine Health and Safety Act was reported from the Education and Labor Committee and when it was passed by the House of Representatives, I voted for it. That bill, as reported by the Committee and as passed by the House, provided compensation for those who had progressive massive fibrosis (PMF), or complicated pneumoconiosis, which, under International Labor Organization (ILO) standards, is considered disabling. At the time I considered this to be the proper thing to do, because miners disabled by pneumoconiosis had not, and did not then, qualify for workers' compensation under State law. The Senate bill also provided compensation to those miners who were totally disabled. In conference, strangely, the references to complicated pneumoconiosis and total disability were removed and simple pneumoconiosis made compensable. Therein began my disenchantment with the black lung program.

The 1969 program envisioned limited Federal responsibility and was not intended to establish a Federal precedent, but was in the nature of a special compensation plan. It was promised that the program was a "one-shot" Federal compensation program until the States compensated pneumoconiosis on the same basis as other workers' compensation claims.

Despite assurances that a "one-shot" total disability compensation program was the intent of Congress, in 1972 amendments were enacted liberalizing the eligibility criteria providing for additional eligible survivors, providing for "unrelated death" benefits

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and, generally, extending the Federal responsibility for an additional period of time. The 1972 amendments so departed from the original promises that they even provided that claims could not be denied on the basis of negative x-ray evidence.

Not only were the assurances of a "one-shot" disability program violated by the 1972 amendments, but a "third shot" was fired in 1977, reaching its target March 1, 1978, when the 1978 amendments became law. Although the 1978 amendments did not contain a pension program based on years of mining service, they were actually worse.

They so liberalized eligibility criteria that compensation could be awarded to most miners and their dependents and survivors whether or not the miner had any medical evidence of the disease. These most recent amendments also -- again despite the original assurances -- made the program a permanent Federal program by striking the cut-off date for elimination of the Federal program and by creating the Black Lung Disability Trust Fund -- the fund that is presently insolvent with projected continued and exploding insolvency into the next century. The only way now to stabilize the fund is to charge the users of coal, and eventually all taxpayers and consumers, for the responsibility which should rest on the backs of responsible operators through State workers' compensation systems.

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Black Lung Benefits Program

Mr. Chairman, I have repeatedly stated, and I wish to continue to emphasize, that I support without reservation the right of a coal miner, totally disabled from pneumoconiosis, to receive black lung benefits. The bill you are considering takes only one small step in this direction, but fails to reach the real problems and misconceptions of the existing Federal program.

Before I point out where I think this bill is deficient, let me review the medical and scientific history of black lung to remove lingering misconceptions. Coal workers' pneumoconiosis (CWP) is a distinct disease characterized by the accumulation of coal dust in the lungs and tissue reaction to its presence. CWP can be determined by x-ray. Simple CWP is categorized as stages 1, 2, and 3, and in those stages is not ususally disabling and is not usually progressive. The complicated form of CWP is called progressive massive fibrosis (PMF) and is usually disabling and is usually progressive without further exposure to coal dust. The ILO has distributed x-rays illustrating the various categories of CWP.

Dr. W.K.C. Morgan's testimony submitted to the House Subcommittee on Oversight, Ways and Means Committee, September 28, 1981, states: "There is a direct relationship between the coal dust content of the lungs and the x-ray category, and therefore, chest x-ray is a useful means of monitoring dust exposure." Dr. J. Donald Millar, Director of the National Institute of Occupational Safety and Health (NIOSH), testified before that subcommittee on July 27, 1981, that: ". . . CWP may be diagnosed specifically by use of chest x-ray . . ."

Black Lung Benefits Program

Mr. Chairman, black lung is a legislatively defined term. The present Act defines pneumoconiosis as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. Consequently, the Act's definition includes diseases found in the general population such as bronchitis, emphysema, and other respiratory conditions which may be caused, or aggravated, by cigarette smoking or other environmental conditions.

Over the years, certain testimony on the black lung program which has been accepted by the supporters of the present black lung program has equated CWP with total disability. That accepted testimony is simply incompatible with fact.

The facts are, I want to reemphasize, that in simple pneumoconiosis, category 1, there is seldom, if ever, any abnormality of lung function. In exceptional cases, there may be minimal abnormalities of lung function in miners with categories 2 and 3 of CWP. Unlike CWP, PMF is associated with respiratory impairment, often resulting in permanent disability and sometimes premature death. PMF may progress without further exposure to coal dust, unlike the categories of simple CWP.

In 1976, the National Academy of Sciences issued a report entitled "Coal Workers' Pneumoconiosis Medical Considerations, Some Special Implications" which showed that after working 30 years in coal mines of the anthracite regions, only 14.3 per cent of the miners had progressive massive fibrosis, the disabling stage, while

60 per cent had some nondisabling stage of the disease. The number of miners with the disease is smaller in other regions. In the Appalachian region, only 2.1 per cent of the miners were disabled, while 45 per cent had simple stages of the disease. In the Midwest and West, no statistically significant number were disabled and 25 per cent in the Midwest and 10 per cent in the West had the simple stage of the disease.

In recent testimony before the Subcommittee on Oversight, House Committee on Ways and Means, July 27, 1981, Dr. Millar reported on NIOSH's surveillance program, round two, which showed that 94.2 per cent (107,569) of the miners studied had no evidence of CWP, 4.5 per cent (5,145) had simple category 1, only 0.9 per cent (1,082) and 0.1 per cent (114) had categories 2 and 3, and 0.2 per cent (254) had PMF. Some of the results of the third round of examinations in the national coal workers' health surveillance program were also reported. In that preliminary report of round 3, over 95 per cent of those examined had no evidence of the disease, over 3 per cent demonstrated category 1 of CWP, and no statistically significant number had advanced stages of this simple form of the disease or the complicated form of the disease.

With these figures in mind, despite the low percentage of miners with the disabling stage of black lung, the General Accounting Office (GAO) reports that from 1969 to December of 1980, the Social Security Administration (SSA) has paid over $9 billion in benefits to almost 400,000 claimants, out of 537,000 miners and survivors who filed claims with SSA. From July 1973 through April 1981, the Department of Labor has approved over 94,700 claims out of the more than 282,500 claims it has reviewed, paying benefits of over $1.75 billion from the black lung disability trust fund created in 1978.

It is my contention that approval of these claims, while in conformity with the law, has not been based on disability or on disability related to coal mine employment. To support my contention, I refer the subcommittee to the recent GAO report entitled "Legislation Allows Black Lung Benefits to Be Awarded Without Adequate Evidence of Disability" (HRD-80-81, July 28, 1980). In that report, GAO found that in 88.5 per cent of the cases where Social Security granted awards, medical evidence was not adequate to establish disability or death from CWP.

In testimony before the Ways and Means Subcommittee on Oversight, the GAO reported on its study of the Department of Labor's administration of its program. GAO concluded that in 84 per cent of the cases deemed eligible for benefits, the medical evidence was not adequate to establish disability or death from CWP, although not contrary to law.

These statistics and these findings by GAO, the National Academy of Sciences, and NIOSH demonstrate the need to revise drastically the black lung program. I have introduced a bill (H.R. 4387) to bring the black lung program closer to a real disability program. However, I do not believe the bill being considered today, S. 1922, will accomplish that result.

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Black Lung Benefits Program

Although both the National Coal Association and the United Mine Workers of America are supporting this legislation, I am skeptical of its results. In the course of almost 25 years as a legislator, I have come to the conclusion that whenever business interests and the unions get together and agree on something, we should look very carefully to see if the taxpayer has been forgotten. He usually has.

First and foremost, S. 1922 is prospective only. Every amendment to the black lung program as it affects eligibility applies only to those claims which will be filed in the future. There are areas of the bill which should be applied to present claims.

For example, to save an enormous amount of money and to be compatible with a disability program, certainly offsets should be applied to present claimants. Further, awarding future benefits to potential widows or survivors of living claimants should be stopped unless there is medical evidence of disability caused by CWP in the living miner. There are ample resources for presently living miner claimants to establish CWP and disability through the black lung medical program and free chest x-rays. This change would eliminate payment for deaths unrelated to CWP, with potential considerable savings down the road.

Furthermore, provisions of the bill should be applied to "pending claims," that is, claims already filed, but not finally adjudicated. If S. 1922 becomes law, there will be two "classes"

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of claimants -- those who filed before and those who filed afterwards. When the two "classes" are established is relatively unimportant except that continued awards to those who are not medically disabled should be stricken as soon as possible. This could be facilitated by eliminating presumptions applicable to pending claims and allowing the re-reading of x-rays on pending claims, as well as on x-rays submitted in a living miner's claim when he dies. Most important, none of these suggestions will affect a present claim or claimant who has been awarded benefits, except for the offset recommendation.

By removing certain presumptions (§411(c)(2) and (4)), and entitlements (§411(c)(5)), the bill takes a step in the right direction. However, as noted above, their elimination should apply to pending claims as well as future claims.

Particularly unnecessary is the extension of six months to allow widows to file claims under the 411(c)(5) entitlement provision. As the UMWA states: "Elimination of this provision is expected to have little or no impact since nearly all of the survivors eligible under this presumption already have applied." The six-month grace period only allows the UMWA to canvass the ranks to encourage additional filings for wholly unmeritorious disabilit_ claims.

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nothing in the bill to prohibit these presumptions from being published as regulatory standards by future administrations. Change in the definitions of "pneumoconiosis" and "total disability" would eliminate that possibility.

Particularly troublesome is the proposal to transfer approximately 10,200 claims from responsible operators to the Trust Fund. The equity theory behind the transfer provision has merit since the 1978 amendments imposed liability where it may not have been expected, but the result creates even greater inequity.

The majority of those 10,200 claims are subject to controversion by responsible operators. The Trust Fund cannot contest a claim. As the UMWA states: "Controversions by responsible operators against those claims, therefore, would cease upon enactment. Beneficiaries of those claims would be placed on the rolls for life." No wonder the UMWA supports this provision!

I would not have as much personal opposition to the transfer of those 10,200 claims to the Trust Fund if there were some mechanism for the Trust Fund to protect itself or have a counsel protect it. To legislatively award those claims, where there may be some questionable validity as to their merit, only perpetuates the black lung program's concept as special interest legislation. Furthermore, operators and insurers would be reimbursed for any moneys they have paid for certain of those 10,200 claims. This, in my opinion, may result in an unintentioned windfall for operators and their insurers.

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Black Lung Benefits Program

The law now allows affidavits to establish disability in the case of a deceased miner where there is no relevant medical evidence. The bill proposes to strike the use of affidavits by a potential beneficiary. This is, at most, another cosmetic change. Even the UMWA agrees that this provision accomplishes nothing of substance. They say: "This change should have little impact for two reasons; most claims in the future should have sufficient medical evidence to establish a claim and widows should have no trouble locating someone who will file an affidavit stating that her husband suffered from respiratory problems." I agree. For the reasons stated by the UMWA, affidavits should be prohibited altogether.

Earlier, I referred to x-ray re-reading. The present law prohibits the re-reading of x-rays and prohibits the denial of a claim on the basis of a negative x-ray. The bill proposes to allow re-reading of x-rays. The bill also proposes to do away with the presumption which encompasses the language which prohibits the denial on the basis of a negative x-ray. But the explanation to the bill promises that "This change in no way implies a policy of disapproving claims solely on the basis of a negative x-ray." The result would be that an x-ray could be re-read. A negative x-ray would still not be evidence to deny a claim for CWP.

As indicated earlier, certain respiratory diseases found in the general population may cause impairment and disability, but they do not arise out of coal mine employment and they are not visible on x-ray. The best method of determining CWP is by x-ray.

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Black Lung Benefits Program

The proposed change would continue to allow claims based on diseases found in the general population not arising out of coal mine employment.

The use of the prohibition of a denial on the basis of a negative x-ray is an idea whose time has passed. It was originally enacted in order that claims under Part B be approved expeditiously since many claims were backed up due to an unexpectedly high number of filings under Social Security. Under Part C it is anomalous, since Part C is in the nature of a workers' compensation program, and all evidence should be considered, particularly those that either prove or disprove a claim.

Another issue in the eligibility area that needs correction is the offsets. Present law only allows offsets (i.e., reduction of black lung payments) for other disability awards "due to pneumoconiosis." Under Part C widows' or survivors' benefits are reduced, but under Part B there is no offset for death benefits. The words "due to pneumoconiosis" mean that other disability awards under State or Federal programs do not reduce the black lung awards. A miner can be getting State disability and black lung benefits without an offset. Or he may be getting State disability compensation, Social Security disability or Social Security retirement and survivors' insurance and black lung benefits without a black lung offset. There are now 91,000 persons getting some form of Title II Social Security and Part B benefits. Of that 91,000 about 63,000 are getting Part B and retirement and survivors' insurance; 23,000 are receiving Part B and Social Security disability and are under age 62; and 5,000 received both the latter benefits but are between 62 and 65 years of age.

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Black Lung Benefits Program

Mr. Chairman, the offset issue is complicated because of the offsets in the Social Security programs. It would not be my intention to call for offsets of black lung benefits if such offsets reduced a miner's benefits below that of any other disabled employee in any other industry. My intention would be to treat all disabled workers equally: Equal compensation for equal disability. The fact that the offset provisions are complicated does not call for an 18-month study of offsets. We have the expertise in Congress, in the Finance Committee and in the Ways and Means Committee, to address an offset amendment which will treat disabled employees equally. However, I support the concept of having the excess earnings test applied to Part C as well as Part B, but would have that test applied to all and not just future claims.

Mr. Chairman, I earnestly believe more than cosmetic changes should be made in the black lung program. The principal reform should be to fulfill the original promise and allow the States to assume responsibility for workers' compensation for disability due to pneumoconiosis, the same as States cover other occupational diseases. I have introduced H.R. 4387 which does so. For your consideration, I will briefly summarize my bill.

H.R. 4387 narrows the definition of pneumoconiosis since the present definition has been interpreted to include such conditions as emphysema, which is not a chronic dust disease of the lung, and lung cancer, which has not been shown to be related to coal workers' pneumoconiosis. In addition, the bill excludes sequelae, thus excluding unrelated lung conditions.

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Black Lung Benefits Program

The present definition of "miner" includes anyone who has worked around a mine, in transportation, or even in construction. The Benefits Review Board has allowed a claim of a laboratory analyst who worked in the lab analyzing coal. There is no evidence that these people suffer any increased likelihood of developing coal workers' pneumoconiosis. H.R. 4387 amends the law to define miners as those who have been employed directly in the mining -- extraction -- of coal.

In order to keep definitions in different Federal laws parallel, H.R. 4387 amends the definition of "total disability" to be compatible with that of the Social Security Act. To collect benefits for total disability, the claimant should be unable to perform any work. The definition of total disability applied by the Social Security Administration requires proof that the claimant cannot "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment."

H.R. 4387 also restricts the use of the present presumptions in the law and strikes the 411(c)(2) and 411(c)(4) presumptions and the 411(c)(5) entitlement. It is really necessary that proof of the existence of black lung disease be required before any presumption is raised, and the bill does this. Besides, if there is medical evidence that black lung disease does not exist, the bill provides that a presumption cannot be used to establish a claim.

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Black Lung Benefits Program

H.R. 4387 deletes the provisions tying the benefit level to the increase of the Federal wage level of a GS-2. The increase only contributes to the rate of inflation and the rapidly increasing costs of the program. Since the program was intended to provide a supplement to income -- not as the sole income of a recipient -- there is no reason to index these benefits.

H.R. 4387 removes the "unrelated death benefit" provision. Presently if a miner who is entitled to benefits dies from any cause -- even a cause completely unrelated to his pneumoconiosis -- his eligible survivors are entitled to benefits. This amounts to a life insurance program and not a compensation program and should be repealed, which my bill does.

Black lung benefits are presently offset only by benefits from a State black lung program. They are not offset by workers' compensation benefits from any other program. This means that for benefit purposes a worker can be disabled twice -- an irrational concept. H.R. 4387 amends the statute to permit the offset of black lung benefits by any other workers' compensation benefits.

Since an x-ray is one way of proving or disproving a claim, the bill allows the denial of a claim based on negative x-rays and strikes the provision that does not allow for the re-reading of x-rays. If the program is to be placed on a sound medical basis, the best available medical evidence should be sought and allowed. Presently, claims may be denied or allowed based on a totally inaccurate reading of x-rays. H.R. 4387 will correct this inequity.

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Black Lung Benefits Program

The present law allows an affidavit to be sufficient where there is no medical or other relevant evidence. That means those who will benefit can submit an affidavit that a miner had a cough and can receive benefits. This provision is probably one of the most important reasons the GAO concluded that 88.5 per cent of the random sample of claims are not supported by medical evidence of disability. It is a provision encouraging fraud. Because of its total inappropriateness, H.R. 4387 strikes this affidavit provision. The bill further strikes the provision requiring the Secretary to accept an autopsy report. That does not mean the Secretary cannot accept an autopsy report; it just means the Secretary does not have to accept all autopsy reports submitted.

One of the original promises of the black lung program was that it would be a temporary Federal program. However, despite vast improvements in State programs and benefits, no State program has yet been approved. This is in part because the black lung statute requires the States to adopt standards similar to the Federal law for the determination of the existence of the disease and the definition of disability, and to automatically provide widow's benefits without proof that the miner's death was the result of pneumoconiosis. Even if the Federal government were to approve a State plan, the program would still remain federally regulated. Rather than have the Federal government approve State

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plans, my bill totally terminates the Federal program from processing new claims after the fifth anniversary of the 1978 amendments (February 28, 1983). This is compatible with the original promise that the black lung program was to be a temporary supplemental program.

The black lung program has incorporated many of the provisions of the Longshoremen's and Harbor Workers' Act. One of those provisions provides for a 20 per cent penalty when a claim is not paid upon approval. This is an abuse of the due process procedure. Accordingly, my bill provides that no penalty is added to the compensation award until the operator, or Trust Fund, has the right to contest the claim. In addition, the bill provides that no retroactive payments shall be made of reviewed claims until all administrative and judicial review is completed. Those retroactive payments which have already been paid out where it was ultimately concluded that the miner or survivors were not entitled to benefits have not been retrieved by the Federal government. This adjustment to the law will provide that those moneys will not be lost to the government.

Presently, benefits payable from the Trust Fund are not subject to being contested by either operators or the Trust Fund. H.R. 4387 establishes a special counsel in the Department of the Treasury in order to controvert claims that are the responsibility of the Trust Fund. By being able to protect the Trust Fund from

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ineligible claims, it is hoped that moneys from the Federal Treasury will be saved. Although the Trust Fund is financed by a tax on coal, the Trust Fund is insolvent, with continued projected insolvency, and the Trust Fund must borrow against general revenue funds. Those funds should be protected and the Office of Special Counsel will do that.

The present 50 cent tax per ton on underground coal and 25 cent tax per ton on surface coal is inadequate to fully fund the Trust Fund. My bill changes that tax to 3 per cent and 1 per cent of the price at which coal is sold by the producer of underground and surface coal, respectively. Projections by the Department of Labor in early May show such a tax would make the Trust Fund solvent in Fiscal Year 1986.

In summary, I believe that a doubling of the present tax rate, which now pays benefits for the nondisabled, as well as for disabled miners, requires more than a cosmetic change. Any 100 per cent increase in taxes, as proposed in S. 1922, demands true reform.

Senator **Nickles**. Thank you, Congressman. We appreciate your input.

A couple of quick questions. You may have heard this morning Mr. Berrington's comment that the trust fund does not need the right to contest, because the Department of Labor can adequately protect the integrity of the trust fund. He also alluded to the review before the ALJ's and the Benefits Review Board; thus, the Department was saying that they do not need additional rights to contest the fund. Do you have a comment on that position?

Mr. **Erlenborn**. Well, two comments, Mr. Chairman. First of all, the reversal rate in the courts is rather high, as well, which would indicate that the fund does need more than the Labor Department to protect it.

Second, though not included in any of the written reports from the General Accounting Office, in their oral comments to me, the investigators said that over at the Department of Labor in the past, they have had two sets of criteria for interpreting the act and awarding claims: A more stringent test, if you will, for those where a responsible operator can appeal the allowance of the claim, and a much more liberal test, where no appeal is allowed, which indicates that the Department of Labor, at least in those days, was not protecting the Fund.

Senator **Nickles**. Do you know what the rate of reversal is?

Mr. **Erlenborn**. I think the overall rate is approximately 30 percent, but some of the individual operators in the courts have been getting much higher than the average, sometimes well over 50, ranging up to 70 percent.

Senator **Nickles**. John, as reflected as recently as last summer, in hearings before the Ways and Means Committee, medical science has taught that there are basically two types of coal workers' pneumoconiosis—simple and complicated.

Medical science also showed that it is only the complicated form of the disease that is really disabling. Simple coal workers' pneumoconiosis is not considered disabling. Isn't it true that the act currently allows compensation for not only complicated coal workers' pneumoconiosis, but also for simple?

Mr. **Erlenborn**. Yes, Mr. Chairman. The definition of coal workers' pneumoconiosis into classifications is not new. It existed at the time we were considering this bill, prior to its passage in 1969. As I pointed out in my original statement, both the House and the Senate bills, as they passed the respective bodies, recognized that the only disabling stage—and that does not necessarily mean totally disabling, but disabling to any degree—was the progressive massive fibrosis, or complicated pneumoconiosis. There was no question, and there never has been any question medically, that that is a fact. And as I say, both bills, as they passed the respective bodies, recognized this, and it was not even conferencable in the conference. Despite this, the conference changed the definition and took out the requirement that it be complicated pneumoconiosis—a point which I contested on a point of order in the House and was unfortunately overruled.

It then became quite obvious that it was the intention of the sponsors of the final version of the legislation to give compensation to those who were not disabled; otherwise, they would have left the definition in, as it was when it passed the two houses.

Senator NICKLES. You mention, in your bill that you have introduced in the House, and also your recommendations, I think, several changes in definition. If those changes were made in the definitions of "pneumoconiosis," "miner," and "total disability," plus the other changes that are already incorporated in this bill, do you think that those would be adequate steps to insure that the benefits actually would be going to those disabled miners that are deserving of the benefits?

Mr. ERLENBORN. Those would be the most important changes to be made, Mr. Chairman. They would return the program to what its sponsors were describing, the type of program they were describing back in 1969 and ever since, and yet, the law has been drafted to give compensation to those who were not disabled or were disabled from some cause other than pneumoconiosis.

One other thing is awfully important, not just the change in those definitions, but to what claims those new definitions apply. That is why I would reiterate that they should apply to pending claims as well as those filed in the future. The fact is, the vast bulk of the black lung claims have been filed. Unfortunately, the vast bulk of them have already also been allowed. I would not suggest that we change any of the benefits now going to those who have had allowed claims. I think that is possibly unfair to the claimants and certainly politically not feasible; but we should apply these new definitions to pending claims, so that we stop as soon as possible the awarding of compensation to those who are not entitled to compensation on the basis of total disability from pneumoconiosis.

Senator NICKLES. If we put in the additional definitions and clarifications and tightened up those definitions, and went back and had it apply to pending claims, not just from the date of enactment, all claims received after that date, do you think that we will have gone far enough? I am talking about trying to amend the bill as it is before us today. Are there any other, major things that you would recommend if we are trying to make some possible amendments or changes?

Mr. ERLENBORN. Well, there are some of the other things in my bill. For instance, if there is to be transfer of these claims, we should have a way of defending the trust fund from allowance of claims that have not been justified. So there would be that additional thing.

Those would be the major things that I would like to see in the bill.

Senator NICKLES. On the transfer question—and I will get into this a little bit more with our future panelists—but do you feel that it is equitable to basically take those away from the responsible operators and move those over to the trust fund as a whole?

Mr. ERLENBORN. I think a case can be made for the equity of that. What we have here is a change in eligibility criteria that made a lot more people eligible for the award of claims. And I would, of course, point out that these are people who were not disabled by coal workers' pneumoconiosis, or their claims would have been allowed. But with the eligibility criteria in 1978 being again liberalized, and the new, liberal definition made effective retroactively, I think one could make a case for equity to say that the coal operators did not insure against that exposure, and that the insurance companies were not writing policies to protect against that exposure, because it did not exist back in the days when the policies were written. So I think a case can be made for the equity of the transfer, if we very carefully define which cases are to be transferred, and if we understand what the burden of those cases will be on the Federal Government. However, I think the equity of the transfer is brought somewhat into doubt and question if you do not provide for a defense of these claims by the trust fund or someone in behalf of the trust fund. Then it becomes a giveaway program, because the restraints of seeing that the new eligibility criteria be applied properly will not be there as strongly if it is known that a claim allowed cannot be appealed.

Senator **Nickles**. I appreciate your comments and your statement and also your very frank answers to our questions. I look forward to working with you as this legislation progresses before the Senate and the House. Thank you very much.

Mr. **Erlenborn**. Thank you very much.

Senator **Nickles**. Our next witness today is Bruce Watzman, legislative representative for the National Coal Association.

Welcome, Mr. Watzman.

STATEMENT OF BRUCE WATZMAN, LEGISLATIVE REPRESENTATIVE, NATIONAL COAL ASSOCIATION

Mr. **Watzman**. Thank you, Mr. Chairman.

My name is Bruce Watzman. I am representing the National Coal Association, a trade organization representing most of the Nation's major coal producers, as well as many other companies associated with the coal industry.

I am appearing in the place of Carl Bagge, president of the National Coal Association, who apologizes for not being able to remain this afternoon.

Mr. Chairman, on numerous occasions, the coal industry has appeared before House and Senate committees to present its position relative to legislation intended to reform the black lung program. The regrettable result of these reform efforts has been a widening of the door to abuses that discredit a meritorious program and jeopardize the position of legitimate claimants. What started as a justifiable effort to compensate victims of pneumoconiosis not covered by State programs has been transformed into a Federal supplemental pension program for miners and their survivors.

Let me state unequivocally that the coal industry does not object to the payment of benefits to those who are truly disabled by complicated pneumoconiosis. This was the intent of the original legislation adopted by the House in 1969. However, without a foundation of supportive medical evidence, the legislation was broadened during conference consideration to provide benefits to those suffering from both simple and complicated pneumoconiosis. Moreover, legislative changes adopted in 1972 and 1977 transformed the program into one which provides benefits without any medical determination that a claimant is truly suffering from pneumoconiosis or disabled by the disease.

Mr. Chairman, rather than restate the history of the program as Congressman Erlenborn has so eloquently done, I will address how the National Coal Association arrived at its current position relative to black lung reform.

Mr. Chairman, this committee's concern and the coal industry's concern is the current financial condition of the black lung disability trust fund. Currently, its outlays have exceed income from the coal excise tax by approximately $1.3 billion. The difference is made up by advances from the Treasury which are financed by borrowing. Given today's interest rates, interest payments on these advances will soon exceed benefit payments, and the fund may not be able to repay the debt it has accrued until the 21st century. This is an unacceptable situation for the U.S. Treasury and for the coal industry, which must finance both the benefits and the interest debt. The remedy for this situation is obvious. First, the Congress must amend the Black Lung Benefits Act so that only coal miners who are totally disabled due to pneumoconiosis or survivors of miners whose death was caused by pneumoconiosis are eligible for benefits.

Many factors have been cited as the cause of the present status of the fund. Among them are the inadequacy of the excise tax and the extent to which the Treasury subsidizes the fund by lending money to the trust fund at interest rates below what the Treasury pays for funds it borrows. But the fact is, the reason for the insolvency is the excessively liberal criteria used to qualify individuals for benefits.

Up to this time, Congress has structured the program to provide benefits to the maximum number of claimants, irrespective of disability or the cause of death. It is now time to reverse that trend, so that only those disabled by complicated pneumoconiosis receive benefits.

Mr. Chairman, despite the logic and merit of complete reform of the black lung trust fund to eliminate egregious abuses and assure that only the truly qualified are beneficiaries, it is not easy to fashion an approach that earns the unqualified support of all parties with an interest in this issue.

Over the past several months, the National Coal Association has worked closely with representatives of the administration, the United Mine Workers, and the insurance industry, to develop an acceptable approach that addresses some of our major concerns.

Our objectives have been to reach agreement on changes that will eliminate many of the abuses and inequities which are based on faulty criteria for qualifying for benefits and on a means of increasing the revenue flowing to the trust fund so that it might be restored to solvency.

We believe these objectives are more than adequately addressed in S. 1922, and can be met by enactment of the bill now under consideration.

Lest there be any question, Mr. Chairman, the coal industry continues to believe that there still remain substantive areas that demand attention if this program is to be fully cleansed of problems.

But the proposal before you, which embraces the compromise position worked out by the interested parties, is good legislation. It will do much to eliminate the abuses that have characterized the program in the past and to remake the program into what it is, truly a workers' compensation program, as its sponsors originally intended.

We therefore ask that the committee favorably consider S. 1922 and recommend its enactment.

Mr. Chairman, that concludes my statement. I would be more than happy to answer any questions you may have.

[The prepared statement of the National Coal Association follows:]

NATIONAL COAL ASSOCIATION

STATEMENT BY

CARL E. BAGGE
PRESIDENT
NATIONAL COAL ASSOCIATION

before the

LABOR SUBCOMMITTEE
SENATE LABOR AND HUMAN RESOURCES COMMITTEE

with respect to

S.1922 - A Bill to amend the
Black Lung Benefits Reform Act of 1977

UNITED STATES HOUSE
Washington, D.C.

December 14, 1981

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, MY NAME IS CARL BAGGE. I AM PRESIDENT OF THE NATIONAL COAL ASSOCIATION, A TRADE ORGANIZATION REPRESENTING MOST OF THE NATION'S MAJOR COAL PRODUCERS AS WELL AS MANY OTHER COMPANIES ASSOCIATED WITH THE COAL INDUSTRY. WITH ME THIS MORNING IS BRUCE WATZMAN, A LEGISLATIVE REPRESENTATIVE ON MY STAFF.

MR. CHAIRMAN, ON NUMEROUS OCCASIONS I HAVE APPEARED BEFORE HOUSE AND SENATE COMMITTEES TO PRESENT THE COAL INDUSTRY'S POSITION RELATIVE TO LEGISLATION INTENDED TO REFORM THE BLACK LUNG PROGRAM. THE REGRETTABLE RESULT OF THESE REFORM EFFORTS HAS BEEN A WIDENING OF THE DOOR TO ABUSES THAT DISCREDIT A MERITORIOUS PROGRAM AND JEOPARDIZE THE POSITION OF LEGITIMATE CLAIMANTS. WHAT STARTED AS A JUSTIFIABLE EFFORT TO COMPENSATE VICTIMS OF PNEUMOCONIOSIS NOT COVERED BY STATE PROGRAMS HAS BEEN TRANSFORMED INTO A FEDERAL SUPPLEMENTAL PENSION PROGRAM FOR MINERS AND THEIR SURVIVORS.

LET ME STATE UNEQUIVOCABLY THAT THE COAL INDUSTRY DOES NOT OBJECT TO THE PAYMENT OF BENEFITS TO THOSE WHO ARE TRUELY DISABLED BY COMPLICATED PNEUMOCONIOSIS. THIS WAS THE INTENT OF THE ORIGINAL LEGISLATION ADOPTED BY THE HOUSE IN 1969. HOWEVER, WITHOUT A FOUNDATION OF SUPPORTIVE MEDICAL EVIDENCE, THE LEGISLATION WAS BROADENED DURING CONFERENCE CONSIDERATION TO PROVIDE BENEFITS TO THOSE SUFFERING FROM BOTH SIMPLE AND COMPLICATED PNEUMOCONIOSIS. MOREOVER, LEGISLATIVE CHANGES ADOPTED IN 1972 AND 1977 TRANSFORMED THE PROGRAM INTO ONE WHICH PROVIDES BENEFITS WITHOUT ANY MEDICAL DETERMINATION THAT A CLAIMANT IS TRUELY SUFFERING FROM PNEUMOCONIOSIS OR DISABLED BY THE DISEASE.

WITH THIS IN MIND, MR. CHAIRMAN, I WOULD LIKE TO OUTLINE THE EFFECT THIS HAS HAD ON THE OPERATION AND FINANCIAL STABILITY OF THE BLACK LUNG DISABILITY TRUST FUND.

OVERVIEW OF THE BLACK LUNG ACT & REFORM AMENDMENTS

THE FEDERAL BLACK LUNG PROGRAM WAS INITIATED IN 1969 AS TITLE IV OF THE COAL MINE HEALTH AND SAFETY ACT. IT WAS DESIGNED TO PROVIDE BENEFITS TO MINERS TOTALLY DISABLED DUE TO PNEUMOCONIOSIS ARISING OUT OF COAL MINE EMPLOYMENT AND TO SURVIVORS OF MINERS WHOSE DEATH WAS A RESULT OF THE DISEASE. ITS SPONSORS ASSURED THEIR COLLEAGUES THAT IT WAS TO BE:

> "...A ONE-SHOT EFFORT. THIS [PROGRAM] IS NOT A CONTINUING COMPENSATION ARRANGEMENT TO ESTABLISH FEDERAL BASED COMPENSATION FOR THIS OR ANY OTHER INDUSTRY. WE ARE ONLY TAKING ON THOSE WHO ARE NOW AFFLICTED WITH PNEUMOCONIOSIS IN ITS FOURTH STAGE -- COMPLICATED PNEUMOCONIOSIS...
>
> HOWEVER, THIS IS ONLY ONE SHOT. I WANT TO SAY THIS TODAY AND I WANT TO HAVE IT PLACED ON THE RECORD INDELIBLY..." (REMARKS OF HON. JOHN DENT, PAGE H-10047, CONGRESSIONAL RECORD, OCT. 27, 1969).

THE BILL WAS INTRODUCED AND ENACTED AT A TIME WHEN FEW STATES COMPENSATED DISABLED VICTIMS OF PNEUMOCONIOSIS AND WHEN NO STATE PROVIDED SUCH COMPENSATION TO MINERS OR SURVIVORS OF MINERS WHO HAD RETIRED FROM MINING PRIOR TO ENACTMENT OF THE STATE LAW.

THE FIRST RELAXATION OF ELIGIBILITY STANDARDS OCCURED IN THE ORIGINAL ACT WHICH CREATED THREE PRESUMPTIONS TO AID MINERS AND THEIR

SURVIVORS IN ESTABLISHING CLAIMS. THE BILL ENACTED DIFFERED MATERIALLY IN ONE RESPECT FROM THE ONE PRESENTED TO THE HOUSE AND EXPLAINED BY CONGRESSMAN DENT. IT PROVIDED COMPENSATION TO CLAIMANTS WHO EXHIBITED SYMPTOMS AT ANY STAGE OF THE DISEASE, IN SPITE OF THE FACT THAT ONLY IN ITS MOST SERIOUS FORM, PROGRESSIVE MASSIVE FIBROSIS (PMF), IS IT PROGRESSIVE, TOTALLY DISABLING AND EVENTUALLY FATAL. THE SURGEON GENERAL TESTIFIED TO THIS FACT AND STATED THAT "SIMPLE PNEUMOCONIOSIS SELDOM PRODUCES SIGNIFICANT VENTILATION IMPAIRMENT..." (S. REPT. NO. 1254, 94TH CONGRESS, REPRINTED IN THE LEGISLATIVE HISTORY OF THE REFORM ACT.)

MEDICALLY, PNEUMOCONIOSIS IS DIVIDED INTO TWO CATEGORIES: COMPLICATED AND SIMPLE, NEITHER OF WHICH IS STATUTORILY DEFINED. COMPLICATED PNEUMOCONIOSIS (PMF), THE ADVANCED STAGE OF THE DISEASE, INVOLVES SUBSTANTIAL FIBROTIC REACTION OF THE LUNGS TO DUST DEPOSITS, LEADING TO MARKED PULMONARY IMPAIRMENT AND SEVERE DISABILITY, ESPECIALLY IN LATER YEARS. SIMPLE PNEUMOCONIOSIS, HOWEVER, IS A LESS ADVANCED FORM. IT IS NOT CONSIDERED DISABLING AND IS "SELDOM PRODUCTIVE OF SIGNIFICANT RESPIRATORY IMPAIRMENT."

IN 1972, CONGRESS GREATLY EXPANDED THE ELIGIBILITY CRITERIA OF THE ACT FOR A SECOND TIME BY ADDING A NEW PRESUMPTION OF ELIGIBILITY BASED ON COAL MINING EXPOSURE OF 15 YEARS OR MORE, BY EXTENDING ELIGIBILITY FOR BENEFITS TO SURVIVORS OF MINERS WHO DIED FROM CAUSES OTHER THAN PNEUMOCONIOSIS, AND BY MAKING SEVERAL ADDITIONAL CHANGES IN EVIDENTIARY AND ELIGIBILITY REQUIREMENTS. THE NEW FIFTEEN YEAR PRESUMPTION WAS AND IS OF PARTICULAR CONCERN TO THE COAL INDUSTRY

BECAUSE NO MEDICAL EVIDENCE HAS SHOWN A CLEAR CASUAL RELATIONSHIP BETWEEN DURATION OF EMPLOYMENT AND THE INCIDENCE OF DISABILITY DUE TO PNEUMOCONIOSIS. SUPPORTING THIS CONTENTION WAS TESTIMONY PRESENTED BY THE SURGEON GENERAL WHO STATED, "THE OCCURENCE OF PNEUMOCONIOSIS IS SPOTTY FOR WORK PERIODS OF LESS THAN 15 YEARS." (S. RPT. NO. 743, 92ND CONGRESS.) FURTHERMORE, IN TESTIMONY BEFORE THE SENATE SUBCOMMITTEE ON LABOR, THE NATIONAL ACADEMY OF SCIENCES STATED, "AT BEST, THE EVIDENCE PRESENTED TO CONGRESS INDICATES THAT IT TAKES 10 TO 15 YEARS OF UNDERGROUND MINING FOR COAL MINERS EVEN TO BEGIN TO DEVELOP COAL WORKER'S PNEUMOCONIOSIS."

AGAINST THIS BACKGROUND, CONGRESS IN 1977 AMENDED THE ACT FOR A THIRD TIME ONCE AGAIN EXPANDING THE ELIGIBILITY REQUIREMENTS. AMONG THE CHANGES WERE THESE:

- PNEUMOCONIOSIS, WHICH WAS PREVIOUSLY DEFINED AS A CHRONIC DUST DISEASE OF THE LUNGS ARISING OUT OF COAL MINE EMPLOYMENT, WAS BROADENED TO INCLUDE "RESPIRATORY AND PULMONARY IMPAIRMENTS, ARISING OUT OF COAL MINE EMPLOYMENT."

- THE DEFINITION OF "MINER" WAS BROADENED TO INCLUDE CERTAIN TRANSPORTATION AND CONSTRUCTION WORKERS AND EMPLOYEES OF COAL MINING COMPANIES WHO WERE NOT ENGAGED IN COAL MINING ACTIVITY.

- "TOTAL DISABILITY" WAS BROADENED SO THAT THOSE STILL CAPABLE OF WORK, THOSE WHO VOLUNTARILY RETIRED FROM COAL MINING OR THOSE STILL WORKING COULD QUALIFY FOR BENEFITS, IN MANY INSTANCES ON THE BASIS OF ADVANCED AGE ALONE.

THESE REDEFINITIONS HAVE RESULTED IN A TRUCK DRIVER, A WEIGHTMASTER, A LABORATORY TECHNICIAN, A CARPENTER, AND A MOLDER IN A COMPANY FOUNDRY; QUALIFYING UNDER THE DEFINITION OF "MINER," EVEN THOUGH THEY HAD NO EXPERIENCE UNDERGROUND.

o FINALLY, A NEW 25-YEAR PRESUMPTION WAS ADDED, THE LABOR DEPARTMENT WAS DIRECTED TO RE-EXAMINE ALL CLAIMS WHICH HAD BEEN DENIED PRIOR TO MARCH 1, 1978, AND LANGUAGE WAS ADOPTED TO LIMIT THE GOVERNMENT'S ABILITY TO RE-READ X-RAYS.

THIS LAST POINT IS OF PARTICULAR CONCERN SINCE THE X-RAY IS REGARDED AS THE BEST EVIDENTIARY TOOL FOR DIAGNOSING PNEUMOCONIOSIS IN A LIVING MINER. THIS CHANGE IN THE LAW REQUIRED THE SECRETARIES OF HHS AND DOL TO ACCEPT A LOCAL X-RAY READER'S DIAGNOSIS EVEN THOUGH TESTIMONY PRESENTED BEFORE THE SENATE SUBCOMMITTEE ON LABOR STATED THAT LOCAL DOCTORS OFTEN MISTOOK ANOTHER LUNG DISEASE FOR PNEUMOCONIOSIS OR COMPLETELY OVERLOOK THE PRESSENCE OF A SEPARATE DISEASE WHEN INTERPRETING X-RAYS.

LASTLY, THE 1977 AMENDMENTS INCORPORATED THE BLACK LUNG REVENUE ACT OF 1977 WHICH CREATED THE BLACK LUNG DISABILITY TRUST FUND. THE FUND HAS DUAL PURPOSES - NAMELY, TO COLLECT OPERATOR PAYMENTS THROUGH THE COAL EXCISE TAX AND TO PAY BENEFITS TO CLAIMANTS FOR WHOM NO RESPONSIBLE OPERATOR CAN BE DETERMINED.

THIS COMMITTEE'S CONCERN AND THE COAL INDUSTRY'S CONCERN IS THE CURRENT FINANCIAL CONDITION OF THE BLACK LUNG DISABILITY FUND.

CURRENTLY, ITS OUTLAYS HAVE EXCEEDED INCOME FROM THE COAL EXCISE TAX BY APPROXIMATELY $1.2 BILLION. THE DIFFERENCE IS MADE UP BY ADVANCES FROM THE TREASURY WHICH ARE FINANCED BY BORROWING. GIVEN TODAY'S INTEREST RATES, INTEREST PAYMENTS ON THESE ADVANCES WILL SOON EXCEED BENEFIT PAYMENTS AND THE FUND MAY NOT BE ABLE TO REPAY THE DEBT IT HAS ACCRUED UNTIL THE 21ST CENTURY. THIS IS AN UNACCEPTABLE SITUATION FOR THE U.S. TREASURY AND FOR THE COAL INDUSTRY WHICH MUST FINANCE BOTH THE BENEFITS AND THE INTEREST DEBT.

THE REMEDY FOR THIS SITUATION IS OBVIOUS. FIRST, THE CONGRESS MUST AMEND THE BLACK LUNG BENEFITS ACT SO THAT ONLY COAL MINERS WHO ARE TOTALLY DISABLED DUE TO PNEUMOCONIOSIS, AS THE MEDICAL COMMUNITY DEFINES IT, OR SURVIVORS OF MINERS WHOSE DEATH WAS CAUSED BY PNEUMOCONIOSIS ARE ELIGIBLE FOR BLACK LUNG BENEFITS.

MANY FACTORS HAVE BEEN CITED AS THE CAUSE OF THE PRESENT STATUS OF THE FUND. AMONG THEM ARE THE INADEQUACY OF THE EXCISE TAX AND THE EXTENT TO WHICH THE TREASURY "SUBSIDIZES" THE FUND BY LENDING MONIES TO THE TRUST FUND AT INTEREST RATES BELOW WHAT THE TREASURY PAYS FOR FUNDS IT BORROWS. BUT THE FACT IS, THE REASON FOR THE INSOLVENCY IS THE EXCESSIVELY LIBERAL CRITERIA USED TO QUALIFY INDIVIDUALS FOR BENEFITS. UP TO THIS TIME, CONGRESS HAS STRUCTURED THE PROGRAM TO PROVIDE BENEFITS TO THE MAXIMUM NUMBER OF CLAIMANTS IRRESPECTIVE OF DISABILITY OR THE CAUSE OF DEATH. IT IS NOW TIME TO REVERSE THAT TREND, SO THAT ONLY THOSE DISABLED BY COMPLICATED PNEUMOCONIOSIS RECEIVE BENEFITS.

Mr. Chairman, despite the logic and merit of complete reform of the Black Lung Trust Fund to eliminate egregious abuses and assure that only the truly qualified are beneficiaries, it is not easy to fashion an approach that earns the unqualified support of all parties with an interest in this issue.

But I am pleased to report that over the past several months the National Coal Association has worked very closely with representatives of the Administration, of the United Mine Workers, and the insurance industry to develop an acceptable approach that addresses some of our major concerns.

Our objectives have been to reach agreement on changes that will eliminate many of the abuses and inequities which are based on faulty criteria for qualifying for benefits, and on a means of increasing the revenue flowing to the Trust Fund so that it might be restored to solvency.

These objectives are adequately addressed in S.1922, and can be be met by enactment of the bill now under consideration. Among its provisions are these:

- Three of the five presumptions now in law would be eliminated.
- No longer would the Department of Labor be precluded from re-reading X-ray films used as part of the diagnostic procedure;

- FOR CLAIMS FILED AFTER DATE OF ENACTMENT, SURVIVOR BENEFITS WOULD BE LIMITED TO THOSE CASES IN A DEATH WAS THE RESULT OF PNEUMOCONIOSIS AND NOT FROM AN UNRELATED CAUSE;
- THE SOCIAL SECURITY EXCESS EARNINGS OFFSET PROVISIONS WOULD BE APPLIED TO PART C CLAIMS;
- THE SECRETARY OF LABOR WOULD BE REQUIRED TO INITIATE TWO STUDIES AND REPORT LEGISLATIVE RECOMMENDATIONS TO CONGRESS WITHIN 18 MONTHS; AND
- THE EXCISE TAX ON COAL WOULD BE TEMPORARILY INCREASED BY AN AMOUNT SUFFICIENT TO RESTORE THE BLACK LUNG TRUST FUND TO SOLVENCY.

LEST THERE BE ANY QUESTIONS, THE COAL INDUSTRY CONTINUES TO BELIEVE THAT THERE STILL REMAIN SUBSTANTIVE AREAS THAT DEMAND ATTENTION IF THIS PROGRAM IS TO BE FULLY CLEANSED OF PROBLEMS.

BUT THE PROPOSAL BEFORE YOU, WHICH EMBRACES THE COMPROMISE POSITION WORKED OUT BY THE INTERESTED PARTIES, IS GOOD LEGISLATION. IT WILL DO MUCH TO ELIMINATE THE ABUSES THAT HAVE CHARACTERISED THE PROGRAM IN THE PAST AND TO REMAKE THE PROGRAM INTO WHAT IS TRULY A WORKERS COMPENSATION PROGRAM, AS ITS SPONSORS ORIGINALLY INTENDED.

WE THEREFORE ASK THAT THE COMMITTEE FAVORABLY CONSIDER S.1922 AND RECOMMEND ITS ENACTMENT.

Senator **Nickles**. Thank you, Mr. Watzman.

The Department of Labor submitted figures to Congress showing when the trust fund becomes solvent. One of the factors taken into account is coal production, and separate statistics were used for underground coal and surface coal production. Has your organization had a chance to review those assumptions, and if you have, do you regard them as accurate, or overly optimistic, or possibly under?

Mr. **Watzman**. Mr. Chairman, much like the Energy Information Administration, who provided the production figures for the Department of Labor, we poll utilities, we review new utility units that may be coming on line, and poll our member companies as to their future contracts and contracts they may be in the midst of discussing.

As to whether the split of underground to surface is correct in the Department of Labor package, we are looking 10 years down the road, and in anyone's mind, it is a best guess. We do not have any significant problems with them, although I must emphasize once again, it is really a best guess.

Senator **Nickles**. Just glancing at the production figures for underground coal, it shows an estimate of 348—I am assuming that is millions of tons—in 1982; 10 years down the line, almost doubling that, 772; and in another 10 years, almost doubled again, at 1,232 million tons. So there is a very progressive, online increase in production. It is probably based on an increase per year. But I am concerned about some of the estimates, the low percentages, and finding Senator Randolph and myself coming back here in 2 years and finding that the fund is still not back on a par basis, or even approaching the estimates that we have put out for 1985, being able to start retiring the debt that we have.

Mr. **Watzman**. Senator, we share that concern. We do not want to have to come back here every 2 or 3 or 4 years and see that the program is no closer to solvency than it is today.

We have begun to duplicate the model of the Department of Labor. It is being done in-house by people on staff. We have not as yet factored in all the variables, but we would be more than happy to provide that information to the committee once it is developed.

Senator **Nickles**. I would appreciate that, because I think it is important. Here again, the very image of sending out to the industry and also to the taxpayers is what kind of liability are we talking about.

I see from your testimony before the Ways and Means Committee that you contend that it is unfair for coal operators as contributors to the trust fund to become lifetime insurers without having the opportunity to contest the initial determination of eligibility. You propose giving the trust fund a right of appeal and creating an office of special counsel in the Treasury; yet, your testimony today does not make a similar recommendation. Have you abandoned your position, or do you feel like this is the compromise?

Mr. **Watzman**. I do not think it can be characterized as a question of abandoning our position, Senator. Following our testimony at Ways and Means, the board of directors of the National Coal Association did meet to consider the proposal that had been developed by the Department of Labor. At that time, they voted to support the proposal, which did not contain the office of special counsel.

It is our feeling that if these changes are enacted into the law, the approval rate will be such that there will not be the drastic and dramatic need to have the trust fund be given the authority to contest claims.

Senator NICKLES. Senator Randolph, I have no further questions. This is Mr. Bruce Watzman, who is representing the National Coal Association. Do you have any questions?

Senator RANDOLPH. Thank you, Mr. Chairman. I regret that I have been unable to hear at least one, possibly two, witnesses.

Senator NICKLES. You only missed half a witness. Congressman Erlenborn continued his statement and concluded probably 15 minutes ago.

Senator RANDOLPH. Well, I thank you very much. These schedules are somewhat difficult at times, and that is what I have run into today.

In your statement, which is given on behalf of the National Coal Association—is that correct——

Mr. WATZMAN. Yes.

Senator RANDOLPH. Regardless of who presents the statement here, it is the position of the National Coal Association. When you answer in the affirmative, I ask you only for the record, is that a position that has been determined by a board of directors, by the officers of the Coal Association? How is the statement prepared, may I ask?

Mr. WATZMAN. The statement was developed, Senator, from a position taken by the board at a meeting it held in late September. At that time, we were presented with the proposal developed by the Department of Labor there were three abstentions, the rest were affirmative votes of the board members present.

Senator RANDOLPH. And Mr. Watzman, the statement itself contains no specific references to projections tonnage mined in the future. Are you prepared today, or to provide our subcommittee with the projection—perhaps—on tons of coal to be mined through surface mining in one case, and underground mining in the other?

Mr. WATZMAN. Yes, Senator. As I informed Senator Nickles, I do not have that information readily available to me right now, but we will make it available to the committee.

Senator RANDOLPH. The coal industry has been known as an up-and-down industry from the standpoint of, perhaps, the prosperity of the operators, even the movement of tonnages by truck or rail or by water to the consuming public. At the present time would you, for your association, say that the coal industry, taking it countrywide, both East and West and in the other sections where coal is mined, would you say that it is not only an important, viable industry, but is profitable to those who are engaged in it?

Mr. WATZMAN. Yes; I would have to agree with you.

Senator RANDOLPH. Has this been of long duration, this profitability of which you now speak?

Mr. WATZMAN. As you well know, Senator, the coal industry has been characterized as a "bust or boom" industry. We compete domestically with both oil, natural gas, and nuclear, in our largest market, the utility sector. It depends on the ratio of our price to the price of other fuel sources. Right now, we are competing with a decontrolled price for oil. We are able to hold our own against that fuel source. However, we are still competing with a controlled price for natural gas. Because of this, we have found, many utilities are remaining on natural gas or turning to natural gas rather than coal. Therefore, the future of the coal industry is difficult to ascertain.

Senator RANDOLPH. What percentage of the coal mined in the United States moves in export trade?

Mr. WATZMAN. It is a rather small percentage right now, Senator. I do not know the exact percentage. I believe, however, our estimates on exports this year is in the range of 70 million tons. With total production of 800 million tons, the export market represents a small percentage of the total market.

Senator RANDOLPH. Could you give a further breakdown, Mr. Watzman, of the coal tonnages and the uses for those tonnages in the United States of America; wherever coal is used, what is it used for throughout America. I would like, and I am sure the subcommittee members would want to have that.

Mr. WATZMAN. Yes, sir.

Senator RANDOLPH. You speak of, at this present time, rather substantial profitability. That would not, of course, apply to all operators.

Mr. WATZMAN. Certainly not.

Senator RANDOLPH. We in our office are constantly aware of the problems that come in West Virginia and even from other States, where the operators within West Virginia are also operators within other States, who speak of the problems that present themselves almost on a day to day basis. It is not my purpose in this hearing to go into those matters, but I do think in connection with the fund that we are speaking of, you perhaps should have in the record what would be a projection of production, and let us say the type of uses for that production as it moves to the consuming public in this country or abroad, let us say in the next year, 2 years, or whatever the figure is. You must have estimates; I am sure you do. Would you provide us with those?

Mr. WATZMAN. Yes, sir.

Senator RANDOLPH. Now, how much, Mr. Watzman, has the coal industry paid into the disability trust fund in, let us say, fiscal year 1981; how much is it anticipated that you will pay in fiscal year 1982, and perhaps fiscal years 1983, 1984, and 1985? I would hope that you could give us some estimate. That would be helpful, I believe, Mr. Chairman, for the record.

If you have any of that information, you could give it to us now; if not, we would certainly receive it and understand its delay for the present.

Mr. WATZMAN. We will see that that gets up to you, Senator.

Senator RANDOLPH. Now, there is something that we would want you to discuss, if you would. That is the so-called need for transferring more than 10,000 claims from responsible operators to the fund. I think that we should know if we can receive that information, who are these operators and what is the dollar value of this transfer provision to the coal industry itself.

Mr. WATZMAN. Senator, on that point, we have worked very closely with the insurance industry, as well as the administration, to try to define the universe of transferred claims as tightly as possible. It is estimated that there may be anywhere from 17,000 to 22,000 claims that could qualify under this category. This represents the broad category that was in the legislation advanced by Congressman Perkins last Congress.

We have narrowed the definition to a point where we feel relatively comfortable with a universe of 10,200 claims. While many people believe this provides relief only to the insurance industry, it also provides some important help to some smaller operators throughout the country. Right now, there are lawsuits in every circuit court throughout the country as to who should actually be responsible for the liability of these claims.

Senator RANDOLPH. Who is bringing the lawsuit in question?

Mr. WATZMAN. It is both the coal industry and the insurance industry. If the ultimate decision is that this liability should rest with the coal industry, our estimates show that there will be quite a few smaller operators who will be forced into bankruptcy the moment the decision is rendered. These are operators who are not self insurers, who went out and bought coverage assuming that this classification of claims were covered under that policy. If they are found ultimately to be liable for these claims, they will have no coverage for them.

Senator RANDOLPH. Would it be correct for me to indicate that in connection with these transfers, that some savings might come to the industry; is that correct?

Mr. WATZMAN. I am not sure in what——.

Senator RANDOLPH. Well, there might be a savings, is that not true, by such transfers we are discussing, that would come to an operator in question?

Mr. WATZMAN. I think there will be a savings to the individual responsible operator, but there will be an initial increased liability to the fund.

Senator RANDOLPH. And there might possibly be a savings taken the two steps that you have indicated; is that correct?

Mr. WATZMAN. Yes.

Senator RANDOLPH. You have no idea, of course, where such savings might be used. Would they be plowed back into the operation to enlarge it and move to a second operation, or would it be to improve, perhaps, the quality of the mining from the standpoint of health and safety?

Mr. WATZMAN. No; I do not know how each individual company would use these funds.

Senator RANDOLPH. Mr. Watzman, do you have any indication that over half the mines meet the standard one milligram of respirable dust per cubic meter of air? If this is correct, can the other half of the mines meet this standard, and if correct, when would you estimate they would meet it?

Mr. WATZMAN. Senator, the latest figures from MSHA indicate that well over half of the industry is meeting the 1 cubic meter standard. More significantly, only in the area of long wall mining has the industry not been able to meet that standard, but there are technological advances, and we hope sometime in the near future to be able to meet that. I believe that for calendar year 1980 the compliance percentage was in the range of 70 percent on an industry-wide basis.

Senator **Randolph**. Would you know—and it could be given later if you do not have it with you today—how many inspections were made by MSHA last year?

Mr. **Watzman**. Do you mean on an industry-wide basis? They vary, as you know, from mine to mine.

Senator **Randolph**. Well, the citations that were given by MSHA and what were the nature of the citations, if you could speak to that.

Mr. **Watzman**. I believe they covered a broad spectrum of possible violations, Senator. As to the percentage or the number of inspections or number of citations, I think that is information that MSHA continues to compile, and we will try to obtain that for you.

Senator **Randolph**. Thank you. You can understand why this is proper questioning in connection with a matter of this kind.

Mr. **Watzman**. Yes; Senator.

Senator **Randolph**. Is the National Coal Association and its membership satisfied that changes in the tax rates that are proposed under the pending bill, and perhaps other changes, will in the substantial sense resolve the problems of the trust fund?

Mr. **Watzman**. Yes, we are. We concur with the Department of Labor model that, given the increase in the tax, the fund will become solvent in 1995 or sooner, provided projections contained in the model are accurate.

Senator **Randolph**. As I understand it, Chairman Nickles, the different interests—not necessarily competing interests—but the different interests that are engaged in mining and associated with mining have tried in this bill, call it the administration bill—it did originate not within the subcommittee or the committee, or even in the Congress—but is it your understanding that there was a cooperative effort by those spokespeople for the varying interests who have compiled at least the first draft of the measure that is before us?

Senator **Nickles**. I think that is definitely the case, as we will see through the Coal Association, but our next witness will be from the United Mine Workers, and we will also have witnesses from the insurance association, and we have had from the Department of Labor. I think it is obvious that we have had at least some industry and labor cooperation on the legislation.

I have one additional question.

Senator **Randolph**. Yes; I am through for the present time.

Senator **Nickles**. Thank you, Senator.

You brought this up, Senator, and I think it is important, on the transfer. First, your association represents western and eastern coal, surface coal, underground coal; it is the nationwide coal association. Is that not correct?

Mr. **Watzman**. Yes; that is correct.

Senator **Nickles**. Did you have a lot of division between your groups—over the fact that western coal, their instances of black lung disease—is it minimal or nonexistent?

Mr. **Watzman**. Depending on who you would talk to, Senator, they would phrase that one way or the other. There are instances of pneumoconiosis from surface mine activity. There are surface operators who are paying responsible operator claims. That being the newer sector of the industry, they have not had the exposure rate; hopefully, with the new dust standards, they will not in the future. But due to the older sector of the industry being located in the East, the number of filed and approved claims is certainly more prevalent.

Senator NICKLES. Have you had some resistance from members of your association from the West for the inclusion of this, and also, the transfer provisions, that somewhat put a greater liability on their backs, probably, in proportion to their liability?

Mr. WATZMAN. Inclusion of the surface industry was an issue that came up during the discussions on the 1977 amendments and has continued to this point. It was not an issue that was addressed by our board when they met earlier this year. As I stated earlier, other than the three members of the board who abstained, there was a unanimous vote to support this package.

Senator NICKLES. How large is your board?

Mr. WATZMAN. Over 40 members.

Senator NICKLES. An additional question that Senator Randolph brought up. On the transfer provisions, do you have a situation where there are possibly a lot of marginal coal operators that would be in the responsible operator status today that would be transferring their liability primarily on the rest of the industry, kind of somewhat dumping their liability on the rest of the industry?

Mr. WATZMAN. Senator, I do not think anyone could characterize the transfer of 10,200 claims as being a bailout for any particular company, although some have. As the Department of Labor stated, there are hundreds of thousands of claims being paid. Those claims to be transferred represent a fraction of the total. I would be surprised if any of the largest operators in the country would transfer more than a couple hundred claims. Certainly, no coal operator is going to reap a windfall from this transfer provision.

Senator NICKLES. If you had a responsible operator in one category and he had an unusually large incidence—and I have looked through some of the statistics that were supplied earlier on a State-by-State basis, and we find some counties that are enormously high as compared to other counties, with fairly high production, and that would indicate to me that some companies—and I have not looked at company analyses—have had very, very high instances as possibly compared to others, possibly even in adjoining counties. I think it is important that Senator Randolph and other Senators know that that transfer is still going to be paid by the industry.

Mr. WATZMAN. That is very true, Senator.

Senator NICKLES. But you are talking about transfer of liabilities from individual companies to the industry.

Mr. WATZMAN. Yes, you are, but you are not giving the company a carte blanche to transfer whichever claims they prefer. The legislation has been drafted so there is a well-defined universe of claims which would fall into the transfer provision. No company will be able to pick a claim out of the air and decide, "This is one that I will transfer."

Senator **Nickles**. Was there division in your group over the transfer provision?

Mr. **Watzman**. Initially, there was, yes.

Senator **Nickles**. I would expect that there was.

Mr. Watzman, we appreciate your cooperation, and if you would submit for us some of the information requested by myself and Senator Randolph, we would appreciate it.

Mr. **Watzman**. Certainly. Thank you.

Senator **Nickles**. Our next guest today is Micheal Bucker, who is research director for the United Mine Workers Union.

Mr. Buckner, welcome. We appreciate your patience and the patience of the other panelists today.

Incidentally, I will state for all of the panelists, it is not really necessary to read your statements in full. I have read them, and we have some questions we would like to ask, and we are also on the floor of the Senate. I would hope we could finish without having to go into the necessity of an additional recess.

Please proceed, Mr. Buckner.

STATEMENT OF MICHEAL BUCKNER, RESEARCH DIRECTOR, UNITED MINE WORKERS UNION

Mr. **Buckner**. Thank you, Mr. Chairman.

My name is Micheal Buckner. I am an underground coal miner from West Virginia and currently serve as research director for the United Mine Workers of America.

On behalf of the United Mine Workers and the Nation's black lung victims, and in particular, the people who are right at this moment working in dust, I would like to thank you for this opportunity to discuss proposed changes in the Federal black lung law.

As you know, black lung describes the irreversible and often deadly lung diseases afflicting miners unnecessarily exposed to coal mine dust. Despite the fact that coal workers' pneumoconiosis had been recognized as a compensable occupational disease in Europe for several decades, the American medical and legal communities ignored the plight and suffering of miners.

Congress first gave recognition to the black lung problem when it enacted the historical Federal Coal Mine Health and Safety Act of 1969. Although CWP was the only disease mentioned in State workers' compensation laws, Congress legalized the term "black lung" as a synonym for that disease in the 1969 act.

The black lung disability trust fund was mandated by the Black Lung Benefits Revenue Act of 1977. That act was designed to place primary financial responsibility for the black lung benefits program on the coal mining industry rather than the Federal taxpayer. The financing system, as we know, was to be self-sustaining. Mine operators were required to pay benefits to black lung victims for whom they were legally responsible and a trust fund, financed through a tax on coal production, was established to pay benefits to other approved claimants.

As you know, Mr. Chairman, it has become obvious that the tax revenues are not adequate for a self-sustaining system. The Department of Labor estimates that the trust fund will never become solvent under the current tax rate. The UMWA believes that it is essential to correct this situation; we must fulfill the congressional mandate of a self-sustaining trust fund by raising the coal tonnage tax.

The bill under consideration will set the trust fund on a path to solvency by doubling the current tax rate and making changes in the interest provisions that coal operators must pay on money owed to the trust fund. The Department of Labor estimates that these amendments will allow the trust fund to cease borrowing by 1986 and achieve solvency by 1994. The UMWA strongly supports these changes.

In addition to changes in the tax and interest rate provisions which are related to trust fund claims, the bill proposes to amend certain eligibility requirements for all future claims, including responsible operator claims. The provisions that are to be amended are not responsible for the trust fund deficits, and their elimination will not add substantially to the expected date of solvency. Contrary to previous testimony, it is not the liberal eligibility requirements that have caused huge deficits. It is the excessive levels of respirable dust that created hundreds of thousands of disabled black lung victims, and these are responsible for the huge expenditures by the trust fund. And only an increase in the revenue will eliminate that debt.

After a considerable internal debate about the serious implications of a continuing trust fund deficit, the UMWA reluctantly has decided to conditionally accept the changes if the final version of the bill is consistent with the intent of the administration's proposal.

This decision was not an easy one for our union, but we believe that the financial problems of the program must be solved. Secretary Donovan, in a recent letter to the chairman of the House Education and Labor Committee, said:

> This legislation provides a solution to the long-term problems of the fund, and should obviate the need to constantly revisit this matter each time there is a change in coal production or the economy in general.

Concerning the changes in eligibility, Secretary Donovan stated:

> You are aware of the considerable criticism of the current black lung program, including that which continues to be made by the GAO. Passage of this bill will, I believe, eliminate much of that criticism.

Mr. Chairman, I failed to bring it with me today, but I would like to submit for the record an article written by Dr. Lorin Kerr, director of the UMWA Occupational Health Department, concerning those criticisms.

Senator NICKLES. We will put it in the record as soon as we receive it.

Mr. BUCKNER. Thank you.

[The article referred to follows:]

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Black Lung

by Lorin E. Kerr

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Black Lung

LORIN E. KERR

THE term *black lung* may be anathema to some, but it is now a well-known term with legal status. The revival in 1968 of this 150-year-old term brought coal workers' pneumoconiosis to nationwide attention, intensified a prolonged campaign to develop professional understanding of chest diseases among coal miners, and hastened the passage of state and national legislation.

At work coal miners are covered with dust. It's in their hair, their clothes, and their skin. It gets between their teeth and they swallow it. They suck so much of it into their lungs that until they die they never stop spitting up coal dust. Some cough so hard they wonder if they have any lungs left. Gradually the miners notice they are getting short of breath when they walk up hills. On the job they must stop work to catch their breath. Finally, just walking across the room at home is an effort.

Call it miner's asthma, silicosis, pneumonoultramicroscopicsilicovolcanoconiosis, coal workers' pneumoconiosis, or black lung—they are all dust diseases with the same symptoms.

Miners' asthma was first used in 1822 to describe the lung disease occurring among coal miners, and this phrase is still heard in some places. The cause of the spitting, coughing, and breathlessness in coal miners was unknown, so doctors used the well-known word *asthma* as a label to identify the condition. Later, silicosis became known as the disease producing breathlessness in the miner who had worked where silica was thought to be in the coal-mine dust.

Today, after years of research and study, we know that coal-mine dust itself can be the cause of spitting, coughing, and breathlessness in coal miners. One name of the disease produced is *coal workers' pneumoconiosis.* Another, better-known, name is *black lung.*

Coal workers' pneumoconiosis was the term British investigators used for the first time in 1942 to identify a type of dust disease observed in coal miners. The following year this disease, as distinct from, and in addition to, classical silicosis, became compensable in the United Kingdom. Like all occupational diseases, it is man-made and can be prevented.

Coal, for centuries, was dug out of surface outcroppings and shallow mines. In Britain this began about 1234. There was little dust and so there were no dusty lungs. This began to change, however, in the eighteenth century with the advent of the steam engine and a new method of smelting iron. The demand for coal increased rapidly and the mines got deeper and deeper as some problems of ventilation, lighting, and flooding were solved. While black "spittle" and black pigmentation of lungs were observed during the seventeenth and eighteenth centuries, it was not until 1831 that *black lung* was the term used for the first time in a report describing the lungs of a Scottish coal miner. From then until the end of the nineteenth century, coal-mine dust was generally acknowledged in Europe to be the cause of the black lungs and the shortness of breath occurring among coal miners. In 1880 Émile Zola, in his famous novel about French coal miners, *Germinal,* wrote eloquently about the devastating effect of black lung.

In the early years of the twentieth century efforts to suppress coal-mine dust subsided. It was claimed by industry that improved ventilation in the coal mines had virtually eliminated black lung. Some medical "experts" claimed that coal dust was possibly beneficial. This medical denial of the danger of coal-mine dust has continued throughout the years to be the position of company-oriented physicians motivated by a desire to save money for industry.

The main reason for less concern about the danger of coal-mine dust was the attention devoted to silica and silicosis, beginning in 1902. Silica soon became labeled in scientific journals as the most harmful industrial dust, and silicosis as the only important dust disease. Its importance was underscored because pulmonary tuberculosis was a usual complication and frequent cause of death. However, there was little public discussion until 1932. Then silicosis made the headlines and there was wide technical discussion in the United States and other countries. This was not due to sudden realization of a health hazard, but rather to realization of an economic "hazard" for some industries.

Workers were glad to get jobs in 1930 at Hawk's Nest tunnel near Gauley Bridge, West Virginia. Many never returned to their homes. One witness, at the 1936 Congressional investigation of the 476 deaths reported during two years of construction, told of three sons who died of silicosis within thirteen months after starting to work in the tunnel. Efforts to secure worker's compensation benefits for any of the Gauley Bridge victims, living or dead, were most often unsuccessful.

In accordance with a joint resolution by the U.S. Senate and House of Representatives, Secretary of Labor Frances Perkins called the First National Silicosis Conference in 1936. The experts worked in five committees for ten months and submitted their report to Secretary Perkins early in 1937. Many states subsequently added silicosis to the limited list of occupational diseases covered by worker's compensation. But the definition of silicosis and the qualifying requirements were so restrictive that few victims ever received benefits.

ADVANCES IN GREAT BRITAIN

British investigators, unlike Americans, continued their concern for diseases associated with coal-mine dust. By 1927 British doctors were reporting chest x-ray differences between silica and coal-mine dust exposure. Worker's compensation legislation was changed three times before British coal miners disabled by silicosis were finally able, in 1934, to receive limited awards. However, the number of men receiving benefits was a small percentage of all the disabled miners who were examined. Their disability was acknowledged, but the British doctors said it was not caused by silicosis. Deeply concerned about the increasing number of these disabled miners, the British Medical Research Council, a counterpart of the U.S. Public Health Service, initiated in 1937 a comprehensive study of chronic pulmonary disease in south Wales coal miners.

The first report in 1942 identified a "new" dust disease which the British investigators called *coal workers' pneumokoniosis.* The following year this "new" disease became compensable. Coal workers' pneumoconiosis is now generally considered to be a diagnosable occupational dust disease. It is reported to show characteristic chest x-ray changes which have been observed in workers exposed to anthracite or bituminous coal-mine dust and some other carbon dusts both in Britain and the United States. Lung changes observed after death are specifically characteristic.

Coal workers' pneumoconiosis is not really a new disease. It has been reported in every coal-mining country in the world, first as black lung, more recently as coal workers' pneumoconiosis, and finally once more as black lung.

The British Medical Research Council in 1945 established a Pneumoconiosis Research Unit near Cardiff, Wales; its contributions have played a major international role in the diagnosis and prevention of the disease.

The International Labour Organization (ILO), an affiliate of the United Nations, has conducted several meetings of international experts on coal workers' pneumoconiosis. In 1950, they accepted with minor modifications a standardized method of describing and classifying the x-ray changes developed by British investigators. This International Classification was further refined in 1958 and more recently in 1968 and the standardized x-rays and photographs illustrating the Classification are available from the ILO. International scientific cooperation by agencies including the U.S. Public Health Service is responsible for the two most recent revisions known as the ILO-U/C 1971 Classification of Radiographs of Pneumoconioses and the ILO 1979 International Classification of Radiographs of the Pneumoconioses.

The British National Coal Board has made significant progress in the prevention of coal workers' pneumoconiosis. In 1955 nearly 5000 new compensation awards were granted for this disease. By 1965 this number dropped to 1007, and to 539 in 1974. With enhancement of the compensation arrangements in 1974 the new awards increased to 683 in 1975 and 575 in 1976. This was largely due to the marked rise in ex-miners who were certified in 1974, 1975, and 1976, in comparison with earlier years. On the other hand, the annual reports of the Board including the most recent one for 1975–76 indicate a reduction in the percentage of British miners with x-ray evidence of this disease.

AMERICAN INACTION

Countless reports on coal workers' pneumoconiosis have been made in British medical journals but relatively few appeared in the United States before 1969. Despite five major medical conferences beginning in 1952 in Elkins, West Virginia, the disease was not widely recognized in the United States. America's lack of concern was due, in part, to a belief that conditions reported worldwide did not exist in the United States. There was also the mistaken conviction about silicosis. This confusion was compounded by a lack of precise knowledge concerning the effects of coal-mine dust, a condition that still prevails. Then there were and still are to a lesser degree the attitudes and influence of employer-oriented physicians who avoid facing known facts about the ravages of coal-mine dust in human lungs. These things needlessly delayed implementation of feasible dust suppression measures and the enactment of essential compensation legislation.

Efforts of the United Mine Workers of America to secure corrective legislation were nearly always fruitless. A glimmer of hope appeared in

1952 when Alabama became the first state to provide compensation for coal workers' pneumoconiosis. A few years later Virginia recognized the disease as compensable, but pressures were exerted the following year and the amendment was repealed. Pennsylvania enacted legislation effective on December 1, 1965, and Virginia again amended its compensation law in 1968.

In the almost universal absence of compensation coverage for medical benefits, payments by the UMWA Welfare and Retirement Fund for the diagnosis, treatment, and rehabilitation of miners afflicted with this preventable disease amounted to millions of dollars. These disabled miners had more respiratory infections than other miners, and their infections lasted longer. Some of these men became so ill with upper respiratory infections that they required hospitalization for two or three weeks several times every year. Confronted with a mounting toll of pulmonary cripples, the Fund embarked in 1952 on a twelve-point program designed to develop professional understanding of pulmonary diseases among coal miners.

A final comment on our thirty-year lag behind the British prior to 1969 is provided by Dr. Donald Hunter, the world-famous British authority on occupational health. In 1959 in his book *Health in Industry* he wrote extensively on coal workers' pneumoconiosis. He said that although coal had been mined in Britain for 700 years, it was not until 1934 that British physicians began to accept the fact that coal-mine dust in miners' lungs produces a slowly progressive fatal disease. Hunter went on to say: "It must be admitted that medical men by their ill-informed complacency have a heavy load of responsibility to bear for this failure to discover the true state of affairs, a failure which constitutes what is probably the greatest disgrace in the history of British medicine." In 1968 American medicine had barely begun to overcome its "ill-informed complacency" and "discover the true state of affairs" regarding coal workers' pneumoconiosis.

LEGISLATION

On November 20, 1968, the nation was numbed by the sight and fury (for the first time on television) of a devastating coal-mine explosion at Farmington, West Virginia. The public reaction to this slaughter of seventy-eight miners was immediate and violent. Overnight there was an outraged clamor for a strong federal law. The clamor wiped out long-standing barriers which the pleas of the miners and their union had previously been unable to tear down. The public and Congressional campaign to try to eliminate the daily toll of coal-mine accidents soon included the equally destructive losses due to dust diseases. While earlier legislative achievements were also preceded by major mine disasters with great loss of life, the reaction to the 1968 disaster grew to a fervent intensity never witnessed before.

The outgoing Johnson administration, following a mid-December meeting called by the U.S. Department of the Interior to plan corrective legislative action, agreed to endorse strong coal-mine-dust prevention measures, such as the union recommendation for an initial standard of 3 mg. of respirable dust per cubic meter of air. In rapid succession during January 1969 two bills were introduced in Congress.

In southern West Virginia, several months before the Farmington disaster, some interested coal miners, VISTA volunteers, poverty agency lawyers, and three physicians—I. E. Buff, Donald R. Rasmussen, and Hawey A. Wells, Jr.—toured the coal fields. They met in schools and union halls with groups of working and disabled miners and their wives and widows, explaining the death and disability caused by black lung. Late in 1968 a number of miners organized the West Virginia Black Lung Association which successfully led a campaign to introduce a bill in the 1969 session of the West Virginia legislature making coal workers' pneumoconiosis a compensable disease. A somewhat similar bill was also introduced by the United Mine Workers of America. The former bill was quickly made a major issue by the Black Lung Association and militant miners in February when the legislation ran into opposition from the coal-operator-dominated legislature. Most of the 40,000 miners in West Virginia walked out of the mines, and a large number of them marched on the state capitol in Charleston demanding passage of the bill. Three weeks later, after the governor signed the bill, all the miners went back to work. This was one of the largest and longest strikes ever called on the single issue of occupational health. This strike played a vital role in the ultimate passage of similar legislation in three more states in 1969 and one in 1971, and the enactment of the Federal Coal Mine Health and Safety Act of 1969.

Although coal workers' pneumoconiosis was the only disease mentioned in all the state and federal statutes, Congress legalized the term *black lung* as a synonym for that disease in Title IV of the coal-mine act, which is entitled "Black Lung Benefits." The act is historic. The precedent it established played a major role in the enactment of the Occupational Safety and Health Act of 1970.

In the coal-mine act, Congress for the first time mandated that an occupational disease occurring in a major industry must be eradicated. To prevent and control the disease the act stipulated, in Title II, the dates on which decreasing levels of respirable dust occurring in the coal mines must become effective; it also directed periodic chest x-ray examinations of working miners. Coal workers' pneumoconiosis was diagnosed largely on the basis of the British experience; it was dependent on the number, size, and distribution of dust opacities in a chest x-ray and a work history indicating employment in the coal-mining industry.

Congress also recognized that coal workers' pneumoconiosis had produced so many victims that no state or coal company had resources to cope with even partial benefits. In all the 1969 testimony only one witness estimated a number approximating what is now an acknowledged fact—at least 365,000 victims—and his figures were discounted as too high. Congress maintained these people had already waited too long; immediate action was a necessity. Title IV stipulated how this was to be accomplished and provided the only definition of the disease in the act, which reads as follows: "The term 'pneumoconiosis' means a chronic dust disease of the lung arising out of employment in an underground coal mine."

BLACK LUNG BENEFITS

Initially, Congress directed the Social Security Administration (SSA) to administer the federal black lung benefits program. Payments were made from the general treasury, not the Social Security Trust Fund. The law clearly stipulated that federal black lung benefits were not worker's compensation and the program was not to be so administered. At no time did the adversary relationship characteristic of worker's compensation appear in the SSA proceedings.

A working miner was not eligible to receive the benefits until such time as he quit work and it was further determined that he was totally disabled. It is thus impossible to relate in any way the cost of the SSA program to the 205,000 coal miners working today. Those receiving benefits were disabled by unnecessary exposure to coal-mine dust during at least the last thirty years when it is thought that more than one million men had worked some time in the coal-mining industry. While several thousand widows of men whose death could be attributed to coal workers' pneumoconiosis, and totally disabled miners with lung opacities began to receive benefits, it soon became evident that there were thousands more who were equally disabled but were denied payment because they had no x-ray evidence of dust opacities. The coal-mine act was finally amended in 1972 to provide some of these men with coverage. This amendment meant that the term *black lung* is generic and in addition to coal workers' pneumoconiosis includes dust-induced bronchitis and emphysema. The Black Lung Benefits Act of 1972 specified among other things that no application shall be denied solely on the basis of a negative x-ray, and that surface miners would also be eligible for benefits.

When the Social Security Administration ceased operation of the black lung benefits program on July 1, 1973, nearly 600,000 applications had been filed. Of this number about 230,000 totally disabled miners and 145,000 widows were approved for federal black lung benefits. Since the inception of the SSA program on December 30, 1969, more than 90,000 of these disabled miners have died; only 140,250 were still living as of February 1979. It is likely that half of these deaths can be attributed directly to the chronic pulmonary diseases occurring among coal miners. This means that more than eleven men every day wheeze away their lives as the penalty for mining coal to earn a living. Were the seventy-seven deaths a week to occur all on the same day in the same place—remember the Farmington disaster and its seventy-eight victims—the nation would undoubtedly demand immediate and universal compliance with mandated dust standards. Undoubtedly, the standards would be made stricter.

Congress stipulated that the black lung benefits shall be paid at a rate equal to fifty percent of the minimum monthly payment made to a totally disabled federal employee in Grade GS-2. Widows are paid at the same rate. The payment is increased fifty percent for one dependent, seventy-five percent for two, and one hundred percent for three or more. Initially, the miner or widow received $144.50 monthly, and with three or more dependents the total was $288.90. Due to federal supplemental cost-of-living increases these monthly payments through September 30, 1979, are $232 for the miner or widow and $463.90 when there are three or more dependents. From 1970 through February 1979 the total black lung benefit payments approved by the Social Security Administration amounted to $7,044,348,600. In 1973 payments amounted to $1,079,314,000. The current expenditure of somewhat less than $1 billion a year is scant recognition of the long years of neglect the miners have endured. The payments to the living survivors of decades of uncontrolled coal-mine-dust exposure can never equal worker's compensation payments which should have been initiated at least as long ago as 1943 when Britain first provided such coverage. The federal costs will decrease with the gradual demise of the widows and the totally disabled miners.

The 1969 act as amended in 1972 advanced the date the Department of

Labor would assume responsibility for the black lung benefits program from July 1, 1972, to July 1, 1973. However, there was no change in the initial stipulation that the Department of Labor program is worker's compensation with its attendant adversary relationship between the miner and the coal-mine operator. This program is now worker's compensation with an adversary vengeance rarely encountered.

Unfortunately, the Black Lung Benefits Act of 1972 left many claimant problems unresolved. Foremost was the inability of the Department of Labor to process claims expeditiously. A General Accounting Office study indicated that the average length of time for processing a claim was 645 days. In the four years between July 1, 1973, and early 1977, the Department of Labor received more than 106,700 new black lung claims of which about 53,500 were disallowed and 49,200 were pending. Only 4000 claims had been approved. Of those, approximately sixty percent (2400) were receiving federal black lung benefits because the Department of Labor had been unable to locate the last employer. The last employer had been located for the remaining forty percent (1600) and the Department authorized federal payment of benefits for all of them except for 138 who were being paid by the employer. For various reasons the responsible operators were contesting their payment of the other 1462 claims, or 91.4 percent of the total.

Congress again amended the Federal Coal Mine Health and Safety Act of 1969 with the enactment of the Black Lung Benefits Reform Act of 1977 on March 1, 1978. The law removed certain eligibility restrictions that had prevented many coal miners with black lung (and survivors) from obtaining benefits. The definition of pneumoconiosis was expanded to include any other respiratory and pulmonary impairment arising out of employment in or around coal mines, and the term *miner* now included those who worked in coal-preparation plants or were employed in coal-mine construction or transportation. Medical benefits for the treatment of lung disorders were made available from the Department of Labor for eligible federal black lung recipients. The new law also stipulated that the coal-mine operators must assume a greater share of the cost of financing the Black Lung Benefits Program. This is accomplished by a Black Lung Disability Trust Fund supported by excise taxes on coal-producing companies. The 1977 reform act also made the benefit program permanent by eliminating the earlier termination date of 1981.

During the sixteen months following the Presidential signing of the reform act on March 1, 1978, the Department of Labor approved 2265 new claims, 3022 claims previously denied by the Social Security Administration, and 2531 denied by the Department of Labor; it also issued identification cards for medical benefits to 60,360 applicants. While the Department of Labor now required less time to initiate benefit payments, the operators continued to contest a high percentage of approved claims. It is estimated that 138,000 persons will be receiving the black lung benefits financed by the trust fund by the end of fiscal 1980, including 80,000 who will be receiving medical benefits only. This compared with 69,506 who were receiving benefits as of April 30, 1979, including 53,340 who were receiving medical benefits only.

No state worker's compensation legislation has yet been approved to comply with the federal standards specified in the 1969 coal-mine act as amended. It is extremely doubtful that such action will ever occur, certainly not in the absence of a compelling reason such as the loss of specific federal funds.

This underscores the need for national worker's compensation stripped of the usual adversary relationship for all workers. A federal agency should be responsible for determining disability with payment for wage losses and all medical care made from a national fund maintained by payments from management. Only in this manner will it be possible to resolve the thorny problems posed by honest differences of medical opinion, many of which are due to a lack of so-called objective evidence. The interpretation of x-rays is completely dependent on personal opinion, which, despite a high degree of integrity, is subjectively objective. While physiologic tests can indicate probable pathology, a determination of the etiology requires a knowledge of the job-related health exposures, and even then the final arbiter—an autopsy—may reveal totally new and unsuspected etiological factors.

It should be noted that the coal-mine owners have unsuccessfully used the black lung benefits section of the federal coal-mine act on two different occasions to test the constitutionality of the law before the U.S. Supreme Court. Equally lamentable is the fact that about sixteen percent of working miners exhibit x-ray evidence of coal workers' pneumoconiosis. Only a relatively small proportion of these miners may eventually become disabled, varying from slight breathlessness on effort in the early stages of black lung to severe shortness of breath. Premature death is preceded by total incapacity for work in the advanced stages. Coal-mine dust is a killer, but death comes slowly.

Alarming as all the black lung statistics are, it is important to realize that every one of the thousands listed in some report or study is a human being whose lungs have been diseased and disabled as the penalty for mining the nation's vitally needed coal for a living. It is small consolation for a miner with black lung to know that he is "only" one out of a group of five or ten who are so afflicted. Every figure represents a coal miner who is paying a dreadful price for his long years of service in the mines.

TREATMENT PROGRAMS

Since 1973, Congress has annually appropriated about $5.2 million for the National Institute for Occupational Safety and Health (NIOSH) to provide services in accordance with the 1969 coal-mine act as amended. Approximately fifty percent of these funds was devoted to research on the occupational dust diseases occurring among coal miners. While the 1972 black lung amendments authorized $10 million for treatment for each of three years, only $3.5 million was appropriated in 1973. Of the $3.5 million finally appropriated, $2.3 million was granted by NIOSH to seven Appalachian coal-mining states and Illinois for the development of black lung treatment programs. This was combined in the seven eastern states with comparable sums from the Appalachian Regional Commission. NIOSH signed a contract for the remaining $1.2 million with the United Mine Workers of America, which through its Department of Occupational Health developed a total of nine treatment centers in six westerly coal-mining states. The union's Department of Occupational Health was also the state-designated agency responsible for the development of eight centers in Tennessee and eastern Kentucky. The total funding for these two states amounted to an additional $750,000.

The purpose of these programs was to make recent developments available to disabled miners who previously were ignored or forgotten until their illness or pulmonary infection forced them into a hospital. The treatment programs were designed to keep the disabled men in a vertical position rather than delaying care until they were horizontal in a hospital bed. Success demanded that the treatment must also be an integral part of the total medical care the miner received. It is impossible to relieve breathing distress in the absence of therapy for other illnesses such as diabetes, hemorrhoids, or gallstones. Never before had the diagnosis and treatment of black lung been associated with an organized outreach program which was the new major ingredient in therapy. The sick and disabled miners regained a measure of comfort and dignity from these treatment programs.

The combination of fiscal benefits and treatment is essential for providing relief for those disabled by black lung.

The Black Lung Benefits Reform Act of 1977 authorized $10 million each year for the evaluation and treatment of miners suffering from black lung. The 1979 fiscal year appropriation was reduced to $7.5 million and added to the Health Services Administration budget. The money was made available to those agencies designated to receive such funds by state governors.

PREVENTION OF BLACK LUNG

Equally important, however, is the prevention of black lung. Like all other job-related illnesses, black lung is a man-made disease which can be eliminated in one generation. The technology is not new; the use of ventilation and water has been well known for several decades

In accordance with the 1969 coal-mine act the current level of coal-mine dust is 2 mg. of respirable dust per cubic meter of air. The vast majority of underground sections and nearly all strip mines are reported to be in compliance with the 2 mg. standard. While a 1975 study by the General Accounting Office verified the need to improve the present dust-sampling technology and its use, it indicated there is no known method of dust-sampling to replace the one currently in use. The United Mine Workers of America is convinced that the dust-sampling program will attain its Congressionally mandated effectiveness only when operator responsibility is eliminated by a continuous automatic system joined with an automatic shutdown of mining equipment when the stipulated level of respirable dust is exceeded. Equally important is the active participation of the miners in the dust-control program. Only then will it be possible to overcome the miners' opposition to wearing the personal dust-samplers which they believe is the major source of inaccurate reporting. Rather than sampling the individual miner, as was the initial procedure, it was thought it would be more effective to sample the area where the miner is working. There is need for further research to determine a more accurate assessment of the dust levels in both underground and surface mines. Moreover, the current respirable dust level should be reduced to 1 mg.

During the 1969 hearings on the federal coal-mine bill Congress became aware that a dust-suppression campaign must be constantly evaluated. Dust measurement by itself is inadequate. The only known method is periodic chest x-rays of the working miners. The development of new cases of coal workers' pneumoconiosis and progression of the disease provide convincing evidence of noncompliance with dust standards and the need to revise downwards the existing standard of 2 mg. Closely associated is the previously unknown but recently reported elevation of the standardized mortality ratio for lung and stomach cancer among U.S. coal miners. There is also a relatively new exposure to asbestos in some strip mines.

The x-ray of working miners further protects them by the early detection of such conditions as lung cancer and active pulmonary tuberculosis. In addition, a film exhibiting evidence of coal workers' pneumoconiosis provides the miner with the opportunity to exercise the option to be transferred to a less dusty area of the mine. This Congressional mandate in the 1969 coal-mine act was designed to prevent progression of coal workers' pneumoconiosis and thus reduce the likelihood of pulmonary disability.

The first two rounds of chest x-ray examinations of working miners were completed in 1974. The third round was initiated in 1979. In accordance with the 1969 coal-mine act the first two rounds were limited to the underground miners, of whom about seventy-five percent participated in the first round and fifty-five percent in the second round. This decrease can be largely attributed to the confusion generated by the differences in opinion concerning the validity and interpretation of x-rays and various tests required to establish a diagnosis of total disability due to black lung. Related factors have been the inordinate length of time required to secure approval of many black lung applications and the working miners' fear that there is a loss of confidentiality of their x-rays and related reports. It is important to note that the working-coal-miner films and reports are maintained under tight security at the Appalachian Laboratory for Occupational Safety and Health maintained by the National Institute for Occupational Safety and Health in Morgantown, West Virginia.

The third round of roentgenographic examination is well advanced but includes only underground coal miners. Long-standing United Mine Workers of America efforts to include strip and auger miners continue to be nonproductive despite exposure of some of these miners to asbestos. The criteria for taking and reading the films have been strengthened. However, as with dust measurement, until operator participation is removed it will be impossible to relieve the miners' suspicions about the program. This can best be accomplished by having NIOSH totally responsible for the working-miner x-ray program. Twenty-five percent of the miners should be examined every year; the x-rays should be made on shift, and the operators should continue to pay the costs by reimbursing NIOSH.

The combination of more accurate dust measurements and high-quality comparable films will, for the first time, assure the adequacy of the information essential for eliminating the chronic pulmonary diseases which have plagued the coal-mining industry for decades.

A final preventive measure requires an intensified and expanded medical research program designed to solve some fundamental problems such as the precise role of coal-mine dust in the lungs, the cause and correct measurement of breathlessness on exertion, the value and effectiveness of various types of treatment, and the safe limit of total dust exposure. Only the federal government can conduct and support the in-depth unbiased research necessary to solve these problems. While Congress has slowly increased NIOSH appropriations, the funds are still inadequate to provide necessary services and conduct essential research. Until the annual NIOSH appropriation is more than twice the current expenditure of $79 million, the ravages of job-related disability and death will continue to be the daily penalties paid for not preventing black lung and all other occupational diseases.

One of the avowed precepts of our government has always been the protection of property. In fact it has long been recognized as a right extended to all citizens. This right of the people to have their property protected is essential for protecting the home and the place of business. Of more recent date this protection as a right has been extended to include health. This was necessary because the maintenance of good health and the ability to work is the only property workers have to assure economic sustenance. Thus government has the responsibility to take all possible steps to protect the workers' health; this is their property. Loss of this property through illness increases governmental expenditures at some point. Prudence certainly indicates that job-related illness must be avoided if government is to fulfill its obligation.

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Mr. **Buckner**. Although we disagree with those who have criticized the black lung program, we agree with the administration that passage of this bill will obviate the need to constantly revisit this issue. Our conditional support is based upon the belief that there will be no further attempts to dismantle the program or make it more restrictive.

We understand that the bill provides for continued study by the Departments of Labor and Health and Human Services of the medical information concerning black lung and the extent of disability that arises from the disease. We have received assurances from the administration that we will have an active role in this process and that our concerns will receive serious attention.

Mr. Chairman, one issue that has not yet been raised in these hearings is our greatest concern the need to eliminate this disease. As is the case with all occupational diseases, black lung is manmade, and it is eradicable in one generation. All we have to do is take a few short steps forward.

One is to insist that the respirable dust level be reduced to a level that is not dangerous. The current mandated level is 2 milligrams of respirable dust per cubic meter of air—and cases of black lung continue to appear. We would not be here if they did not. MSHA tells us that more than half the Nation's mines currently have reached the level of 1 milligram per cubic meter. The 1 milligram level means healthier and more productive miners. That level is achievable and desirable. It should be mandated.

A second easy step is to improve the current system of periodic chest X-rays of working miners. Three measures can and should be taken: (1) the National Institute for Occupational Safety and Health should make all the chest X-ray examinations for working coal miners; (2) X-ray exminations should take place on-shift, rather than before or after work, so that 90 percent or more of the miners will be examined regularly and we will know exactly what is going on inside the mines; (3) surface miners and auger miners should be included in the X-ray program. Currently, we do not X-ray working surface miners, even though we have dust standards for them, and even though they have incurred black lung.

Throughout our discussions with the administration on the issue of black lung, we have attempted to impress upon them the importance of prevention. We are pleased to note that they have given serious consideration to the role of prevention and have decided to begin joint labor-management-MSHA review of current activities to reduce the occurrence of coal mine dust and thereby eliminate black lung.

We believe this review, in conjunction with the DOL–HHS studies will demonstrate the need for reductions in the respirable dust levels in order to eliminate black lung. Our hope, Mr. Chairman, is that the necessary preventive steps will be taken so that miners of this generation, those working in the mines today, will not suffer the horrible fate of their fathers and grandfathers.

Thank you.

Senator **Nickles**. Thank you. We appreciate your testimony.

Just a couple of quick questions, Mr. Buckner. You kind of indicated that you really did not think that tightening up the eligibility was going to save a lot of money or do a whole lot of good; that the solution was primarily in increasing the dollars going in. Is that the thrust of what you had to say?

Mr. BUCKNER. Yes, Senator. I do not think the changes in eligibility will add substantially to the date of the solvency, no.

Senator NICKLES. In trying to get this fund on a sound basis, when we have statements by many of the large majority of cases, I think the figure 80-some percent has been used by several witnesses and in the GAO report, et cetera, that those individuals did not suffer from complicated black lung—what is your response to that?

Mr. BUCKNER. Well, we have a number of concerns about the GAO report. Number one, the GAO report of the Social Security Administration reviewed a number of claims that were approved for survivors. In a lot of those cases—and there were hundreds of thousands of those cases—because the medical community and the legal community in this country did not recognize black lung, you had a number of persons who died, say, in the fifties or sixties. Doctors did not recognize pneumoconiosis—very few did—so they did not put anything relating to pneumoconiosis on a death certificate. So you had code words like pneumonia, emphysema, bronchitis, those kinds of things that, if you want to run an equitable system, you either exclude those widows from participating in this program and say, "You are not entitled to it," or say that we are going to use other types of evidence, affidavits, we are going to use what medical evidence we do have on those people who died before the disease was legally recognized, and we are going to run a program that is just for those widows.

We think that the GAO did not take adequate concern for those widows. If Congress had been of the same mind as the GAO, hundreds of thousands of widows would not be receiving benefits today because they had no way, except to dig up their husbands, to prove that their husbands died of black lung. The disease was not recognized.

The other problem with the GAO report is that the consulting physician who determined that there was not adequate medical evidence, to the best of our knowledge, has no expertise in pulmonary diseases; he is not a radiologist, which is a person who is qualified to read X-rays. His expertise, the way I understand it, is in preventive medicine. And Lord knows, we need more preventive medicine, but I am not sure that he was the person to look at those X-rays and determine whether or not there was adequate medical evidence.

The other problem is that GAO never defines what "adequate medical evidence" means, from their definition.

Senator NICKLES. Well, do you dispute whether the medical industry can come up with X-ray capabilities to positively determine whether or not somebody can have complicated pneumoconiosis?

Mr. BUCKNER. I do not think you are ever going to get a situation where a qualified radiologist will tell you that an X-ray can tell you something about disability. An X-ray can tell you only if you have dust opacities, which are the spots on the lungs that show up under complicated pneumoconiosis.

The definition that the Congress has adopted includes dust-induced bronchitis and emphysema and other sequelae of CWP. Now, that has come under considerable criticism, because the general population may get a disease known as bronchitis. Dust can cause bronchitis. Now, if a man breaks his back, he is compensated. Well, that happens in the general population, too, and you do not exclude that from a workers' comp program simply because it can occur in the general population.

Senator NICKLES. But should that be covered under the black lung, or should that be covered by State law?

Mr. BUCKNER. I think it should be covered under the same law that we are talking about today. These are things that are caused by the employment. They are dust-induced bronchitis and emphysema. They are dust-induced, pneumoconiosis.

Senator NICKLES. What if a man smokes a lot of cigarettes?

Mr. BUCKNER. Well, I do not think coal miners smoke any more than the general population. As a matter of fact, at least for underground miners, 8 hours a day, you cannot smoke, because the law prohibits smoking underground, and then 8 hours a day, you are sleeping, so two-thirds of their lives, they are not smoking.

Senator NICKLES. Mr. Buckner, you indicated that the United Mine Workers is conditioning its endorsement of the administration's proposal on primarily the bill—I got that inference from your comments. You also mentioned reopening the 718 regulations. The apparent rationale for this was the current approval rate as a result of the regulations as too low; I am guessing it is in the 7- or 8-percent rate today as compared to past testimony that said it was in the 30- or 40-percent range.

Yet, in testimony before the Ways and Means Committee last July, witnesses from NIOSH reported the results of its surveillance program, and it noted that less than 1 percent of over 100,000 miners screened in the survey had complicated pneumoconiosis. Don't those surveillance findings and the 718 regulations indicate that still, yes, they are providing benefits for all miners who have contracted complicated pneumoconiosis?

Mr. BUCKNER. Well, the X-ray program is only for working miners. So a man may be retired for 10 years before he applies for black lung benefits, so it is almost an apples-and-oranges situation.

The other point is that in order to address the real problem, Senator, the long-term problem of the trust fund and the continuing legal obligation on the coal industry, is to prevent the disease. Now, NIOSH has said 1 percent have evidence of complicated pneumoconiosis. That means that it is progressive. If you remove those people from dust today, their disease will continue to get worse. Now, the simple pneumoconiosis—even though it is irreversible, you are not going to reverse the damage—if we can keep them from getting to the complicated stage, it will not be a progressive disease. If we can get them out of the dust, they will not have to go through those terrible, agonizing deaths that the people with complicated do.

Senator NICKLES. I share your concern and your goal and desire to see if we cannot reverse that in some manner, but yet, when I see the statistics of 100,000 screened, that they found less than 1 percent, and today they are paying 7 or 8 percent, and they hope to get it down to 4 percent, it seems like, yes, we are taking care of those persons who have contracted that disease, at least as far as the complicated scale. So we may not be paying a lot of people who did not have it in that far advanced stage, but at least we will be compensating those, as Senator Randolph said, persons who are currently disabled and deserving of complication. I think we have that common goal, but as far as whether or not those regulations would need to be reexamined.

One additional question. Current law does not afford to the trust fund the right to contest the initial determination of the eligibility by DOL. Responsible operators, however, do have such a right. What possible objection could your organization have to granting such a right to the trust fund?

Mr. BUCKNER. Well, we do oppose granting another step of bureaucracy for the black lung victims to go through. I mean, it is an arduous process that they in most cases do not understand anyhow. And I think if we are going to put any more money into the bureaucratic mechanism of black lung, we need to put it on the end of the Benefits Review Board and the administrative law judges. The reason I say that is because we do have cases that are backlogged. Now, you have a situation right now where, if a coal company contests that claim—and this bill will address the problem—but if a coal company contests the claim, the trust fund pays those benefits, and it might take 2 or 3 years because of the backlog to adjudicate that claim. Now, currently, by regulation, the industry only pays a 6 percent interest rate on that, while the trust fund may borrow at up to 11, 12, and 14 percent. So I think if we are going to put any more resources into the mechanism of the black lung system, that we need to do it on the end of adjudicating those claims and getting them off the backlog.

Senator NICKLES. The Department testified earlier that there has been substantial improvement as far as adjudicating those claims. Have you found that to be the case?

Mr. BUCKNER. I think in large part, yes. What Mr. Berrington did not address, I believe, this morning was the backlog at the Benefits Review Board, and I urge you to take a serious look at putting more resources into that.

Senator NICKLES. They are backed up for this and for——

Mr. BUCKNER. Substantially, and for the Longshore Act, also.

Senator NICKLES. We have entertained in the Longshore bill making some provisions to expand that Board on a basis to hopefully take care of that.

Mr. BUCKNER. Well, we would support that. I believe the coal industry has supported that mechanism, too.

Senator NICKLES. I have no further questions, Mr. Buckner.

Senator Randolph?

Senator RANDOLPH. Thank you, Mr. Chairman.

Mr. Buckner, what is your official position with United Mine Workers of America, for the record?

Mr. BUCKNER. I am a member of local 4019 in Shinnston, W. Va., and I am currently serving as the research director.

Senator RANDOLPH. And may I help the record by saying that Shinnston is located in Harrison County?

Mr. BUCKNER. Yes, sir. I am a resident of Marion County, though.

Senator RANDOLPH. They are contiguous. Off the record, I was born in Harrison County, and it is a good county, good people there. Where were you born?

Mr. BUCKNER. I was born in Charleston.

Senator RANDOLPH. That is Harrison County removed. It is good to meet someone from near home always.

Mike, do you have current figures as to the number of miners or employees within the mining industry at the present time?

Mr. BUCKNER. I can get you accurate figures. If you are talking about coal mining, you are talking, generally, around 220,000. But I can get you more accurate figures, Senator.

Senator RANDOLPH. What are your projections for the future, if you have them?

Mr. BUCKNER. Well, most of the projections that we see now are fairly optimistic. It depends on the growth rate in electricity consumption, and it also, in a small part, depends on the growth in the export market. As you know, a couple of years ago, we had an economic summit, and the Western allies agreed to double their coal consumption over about a 10-year period. Based on those assumptions, we expect substantial growth in the industry, in all parts of the country, and a commensurate increase in employment.

Senator RANDOLPH. How many States have production of coal that goes to the consuming public?

Mr. BUCKNER. I think there are 26 States that currently produce coal.

Senator RANDOLPH. Would you put that in the record as a part of your presentation?

Mr. BUCKNER. Surely.

Senator RANDOLPH. It is so much more widespread than people think of it. They rather think of it as seven or eight States, so often, sometimes the Appalachian area, and forget even a State like Wyoming, with tremendous tonnage.

Could you also give us the breakdown between surface and deep mining, if that is available?

Mr. BUCKNER. Yes.

[The information referred to follows:]

United Mine Workers of America

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UNITED MINE WORKERS' BUILDING
900 FIFTEENTH STREET, N.W.
Washington, D.C.
20005

December 23, 1981

In answer to Senator Randolph's questions:

1. According to the Bureau of Labor Statistics, there were 256,000 miners employed in the coal industry in August 1981.

2. According to the Mine Safety and Health Administration, slightly over 798 million tons of coal were mined in 1980. Approximately 5 million tons of anthracite, 320.5 million tons of underground bituminous and 472.6 million tons of surface bituminous coal was mined.

3. States in which coal was mined, 1980.

    1. Alabama
    2. Alaska
    3. Arizona
    4. Arkansas
    5. Colorado
    6. Georgia
    7. Illinois
    8. Indiana
    9. Iowa
    10. Kansas
    11. Kentucky
    12. Maryland
    13. Missouri
    14. Montana
    15. New Mexico
    16. North Dakota
    17. Ohio
    18. Oklahoma
    19. Pennsylvania
    20. Tennessee
    21. Texas
    22. Utah
    23. Virginia
    24. Washington
    25. West Virginia
    26. Wyoming

MF:FW

Senator **Randolph**. Now, we have talked about medical evidence as it affects black lung, and I spoke of the early days—and I will not repeat it—when we were thinking of only the X-ray. Then we thought of respiratory and pulmonary ailments that were proof, at least in part, of a black lung condition.

Would you comment so that we could, perhaps in particular, understand what you feel is the adequacy or inadequacy of X-rays to diagnose black lung?

Mr. **Buckner**. Well, as I said to the chairman, X-rays are very limited in their usefulness as far as determining disability. An X-ray can only spot dust opacities on the lung. The related conditions, dust-induced bronchitis and emphysema, will not show up on an X-ray. The reason that we—and I think you will know better than I, Senator—but the reason that we currently prohibit denial solely on the basis of an X-ray is because in 1972, the American College of Radiology testified before the Congress essentially what I just said, that they are very limited in their value. And they urged the Congress to take into account any and all diagnostic techniques that could be developed. These include work histories, pulmonary function studies, blood gas studies, ventilation studies, and those types of things. And it was on the basis of their testimony, I believe—and the Senator may be able to correct me on this—was basically on their testimony that they decided that X-rays were limited in their value and that they should use any and all medical evidence that could be accumulated.

Senator **Randolph**. Yes, there was a question mark here, at the very beginning, as to whether the X-ray could do this job in itself. You are saying it could not; is that right?

Mr. **Buckner**. I believe, and I think the American College of Radiology will support the statement, that they will not tell you anything about the disability, and they will only spot a dust opacity.

Senator **Randolph**. The General Accounting Office in its report has been critical of payments, the benefits of black lung, without adequate evidence of death or disability. I am not sure whether you would want to discuss that further with us, but isn't it true that the GAO concluded that payments were not contrary to law?

Mr. **Buckner**. That is my understanding of the conclusion of the report. Senator Nickles and I also discussed that earlier, while you were out of the room, Senator. As you know, many of those social security claims were widows' claims, whose husbands died before the disease was even recognized by the legal or medical communities. So the Congress determined that if we were going to have a just program and allow those widows to participate, we had to do something other than medical evidence. It is hard to get medical evidence on a man who died 20 years ago.

Senator **Randolph**. You may have covered some of these situations while I was away from the hearing. You have had some criticisms and comments, so you are making those available to our subcommittee; is that correct?

Mr. **Buckner**. Yes, sir.

Senator **Randolph**. Are claimants concerned with the time it takes for filing and final approval? Is the compensation adequate—if you would touch those two points.

Mr. **Buckner**. The time involved in processing a claim has come down substantially over the last couple of years. There have been great improvements in the Department of Labor in processing those claims. As you know, they had a substantial job, under the 1977 amendments, of reviewing those claims, and they have processed approximately 200,000 re-reviewed claims in about a 3-year period. That is a fairly good job of doing it. The best evidence that we have now is that the average time for processing a claim is 18 months. Of course, that is an average, and there are cases where it takes much longer to do it.

The problem that we have with the lengthy time for approval is that a lot of these people are extremely old. I have had situations come across my desk where, during the time that a claim is being processed, the miner died. Those are the heart-rending things that really get to you.

Senator **Randolph**. The disability payments, generally, based upon the facts, are they adequate?

Mr. **Buckner**. The adequacy of the payments?

Senator **Randolph**. Yes.

Mr. **Buckner**. They do not fully compensate the man for the fact that he can no longer work. He would make much more money working in the mines.

Senator **Randolph**. Of course at the very outset, we were faced with the problem of who would administer the program—and I jump back to that only for this reason. There was criticism for the handling of the claims by the social security system; is that correct?

Mr. **Buckner**. Yes, sir.

Senator **Randolph**. That change made to the Department of Labor—you have indicated, without mentioning social security, the earlier agency—there has been a speeding up, a better handling, would you say?

Mr. **Buckner**. Yes, sir.

Senator **Randolph**. An appreciation, perhaps, of the type of work they were doing?

Mr. **Buckner**. Yes, sir. The one thing that I would add to that, Senator, is that now we have an adversary system which, even though the initial processing period may be 18 months, because you do have an adversary system with the coal companies coming in and contesting claims, the period may run, before final adjudication, to 3, 4, 5 years. That is why I think it is so important that we put more resources into the Benefits Review Board.

Senator **Randolph**. The definition, or that which is considered for disability, do you feel generally it is fair, or is it too restrictive—just give us your comments.

Mr. **Buckner**. Well, the definition of total disability contained in the black lung law is different than that of a traditional workers' comp law. The reasons for that, again—and I am sure you know better than I do—is because the Congress looked at the coalfields, and the reality in most of the coal field areas is that if you cannot work in the coal mines, you are not going to get any other comparable gainful employment. You either work in a coal mine or as a clerk at a grocery store. It is not a situation that you might have in more industrialized, diverse economies. Coal mining is the economy in the coalfields. Therefore, if you are disabled to the point where you cannot work in the mines, the Congress said you are totally disabled. That is a sociological definition that reflects the reality in the coalfields' as opposed to a strictly medical definition.

Senator RANDOLPH. And a disabled miner could not work elsewhere.

Mr. BUCKNER. Well, if he does work elsewhere, he is economically penalized beyond what should be the case.

Senator RANDOLPH. Well, all of us, Mr. Chairman, certainly you and others who now grapple with this question, are concerned with the elimination, if possible, of black lung disease, as of course we are concerned in America often with the elimination of that which is many-faceted that we would like to see not a part of our society. I would like to see cigarette smoking hardly a part of our society, but it is not for me to tell that person what he or she can do. And someone might say, outlaw those obnoxious cigars; that is worse than cigarettes; or, even those people who smoke pipes. They think they are a part of the thinking process sometimes, the pipe, and do not touch it.

But there are some questions that are concerned with health and safety in the mines that are generally understood, is that right, Mike?

Mr. BUCKNER. Well, I hope that you and I have done a fairly decent job of bringing those things to light.

Senator RANDOLPH. Yes. We need the best inspections possible, is that right?

Mr. BUCKNER. Absolutely.

Senator RANDOLPH. What about the fines that have been assessed, generally?

Mr. BUCKNER. Well, there again, you have a situation where the Congress looked at an industry and determined that the best way to enforce is to make it economically more difficult for them to disobey the law. You have a situation where if we do not fine them—if it costs them $1 million to clean something up, and you are only going to fine them $100 to make the necessary changes to prevent diseases and accidents, they are not going to do it. And I think the Congress clearly understood that when they enacted the 1969 act and its amendments. You have to enforce the law by the means that will make it more difficult for them to disobey than to obey.

Senator RANDOLPH. Well, it is difficult to always reach the law to the point of not its passage, but its enforcement. We have, as Senator Nickles knows, a speed limit of 55 miles an hour, and I guess we could say very quickly it is being violated constantly in Oklahoma or in West Virginia—or anywhere—and yet, it was placed in the body of law because it was felt that it had a double help of reducing accidents and deaths, and also saving fuel.

But as we think of those laws where penalties are applied, they are difficult, are they not?

Mr. BUCKNER. Yes, sir, they are.

Senator RANDOLPH. They are very difficult, because the human element is present. Now, we have had told to us, documented, research, certainly, a level of 1 milligram of respirable coal dust per cubic meter of air, even though the mandated standard is 2 milligrams. What is your comment?

Mr. **Buckner**. Well, the problem we have with the 2 milligram standard is that we continue to see cases of black lung occur. MSHA tells us that somewhat over 50 percent of the working sections in the United States are currently operating at the 1 milligram standard. And I think it is on the order of 90-some percent are meeting the 2-milligram standard mandated by law. As Mr. Watzman from the NCA said, we are having a real problem with long wall mining, and we have somewhat on the order of 90 long-wall systems currently operating in the United States, and they are extremely productive. But as in most cases with technology that increases production, you also increase the dust, and we have some substantial problems with the dust on the long-wall sections.

Senator **Randolph**. What States——

Mr. **Buckner**. Well, we have long walls in West Virginia, Pennsylvania, Ohio, Illinois—I believe we have some out West in Utah and maybe Colorado.

Senator **Randolph**. Maybe Wyoming.

Mr. **Buckner**. I am not aware of any in Wyoming, Senator, but there may be.

Senator **Randolph**. But they are rather general?

Mr. **Buckner**. Yes, there are quite a number of them in a lot of places, and the dust levels on those sections are extremely high.

Senator **Randolph**. But mines are located in different parts of this country. They have certain characteristics that are alike and yet that are different. And as we meet standards' or do not meet them, do you feel that each and every mine can meet the same standards—what is your feeling—and how quickly can that standard be met?

Mr. **Buckner**. I think in a fairly short period of time, we could get virtually all the working sections in this country down to the 1-milligram level. And I sincerely believe if we accomplish that level, we will virtually eliminate that disease, and then we will have a self-eliminating problem here of compensating the victims of the past and insuring that the coal miners of my generation do not incur this disease.

Senator **Randolph**. Do we have chest X-rays required now of all miners?

Mr. **Buckner**. Yes; X-rays are mandated for underground miners. We have a problem, and we have been advocating for several years now, that surface miners be included and auger miners be included in this X-ray program. Currently, they are not. So we do not know if the dust standard in the surface mine is adequate.

Senator **Randolph**. Well, when we talk about proposed studies under this bill and the necessity for them, will your organization be ready to be an active participant in those hearings?

Mr. **Buckner**. We are certainly ready, and the administration has assured us that we will have an active role, and we intend to bring to those deliberations many of the problems that I raised here today.

Senator **Randolph**. Just for the record, and some people may not feel as do I, but I think the Black Lung Association should be involved; do you feel so?

Mr. **Buckner**. I think that is a very good idea.

Senator **Randolph**. I think they have certain knowledge, and that would be helpful in connection with the problems of safety and health in the coalfields.

I thank you very much.

Mr. **Buckner**. Thank you, Senator.

[The prepared statement of Mr. Buckner follows:]

TESTIMONY OF

MICHEAL BUCKNER

UNITED MINE WORKERS OF AMERICA

BEFORE THE

SUBCOMMITTEE ON LABOR

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

DECEMBER 14, 1981

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, ON BEHALF OF THE UNITED MINE WORKERS OF AMERICA AND THE NATION'S BLACK LUNG VICTIMS, I WOULD LIKE TO THANK YOU FOR THIS OPPORTUNITY TO DISCUSS PROPOSED CHANGES IN THE FEDERAL BLACK LUNG LAW.

BLACK LUNG DESCRIBES THE IRREVERSIBLE AND OFTEN DEADLY LUNG DISEASES AFFLICTING MINERS UNNECESSARILY EXPOSED TO COAL MINE DUST. DESPITE THE FACT THAT COAL WORKERS' PNEUMOCONIOSIS (CWP) HAD BEEN RECOGNIZED AS A COMPENSABLE OCCUPATIONAL DISEASE IN EUROPE FOR SEVERAL DECADES, THE AMERICAN MEDICAL AND LEGAL COMMUNITIES IGNORED THE PLIGHT AND SUFFERING OF COAL MINERS.

CONGRESS FIRST GAVE RECOGNITION TO THE BLACK LUNG PROBLEM WHEN IT ENACTED THE HISTORICAL FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969. ALTHOUGH CWP WAS THE ONLY DISEASE MENTIONED IN STATE WORKERS' COMPENSATION LAWS, CONGRESS LEGALIZED THE TERM "BLACK LUNG" AS A SYNONYM FOR THAT DISEASE IN THE 1969 ACT.

THAT LAW PROVIDED PARTIAL BENEFITS FOR BLACK LUNG VICTIMS AND, FOR THE FIRST TIME, MANDATED THE ERADICATION OF A MAJOR OCCUPATIONAL DISEASE. TO PREVENT THE DISEASE THE ACT STIPULATED THE DATES BY WHICH DECREASING LEVELS OF RESPIRABLE DUST IN THE COAL MINES MUST BE ACHIEVED. IT ALSO DIRECTED PERIODIC LUNG X-RAY EXAMINATIONS OF WORKING MINERS.

Congress also recognized that CWP had claimed so many victims that no state or coal company had resources to cope with even partial benefits. Congress determined that these people had already waited too long; immediate action was necessary.

The Black Lung Benefits Act of 1972 was the answer to substantial complaints about the administration of the program. People felt that the Social Security Administration was ill-equipped to handle the avalanche of claims and that it treated people unfairly. While several thousand widows of men whose death could be attributed to CWP, and totally disabled miners with characteristic lung X-rays began to receive benefits, thousands more who were equally disabled were denied payments because they had no X-ray evidence of CWP.

The 1972 amendments, in order to provide for such disabled miners, specified that no application shall be denied solely on the basis of a negative X-ray. This means that the term "black lung" is generic and in addition to CWP includes dust-induced bronchitis and emphysema.

The Black Lung Disability Trust Fund was mandated by the Black Lung Benefits Revenue Act of 1977. The Revenue Act was designed to place primary financial responsibility for the black lung benefits program on the coal mining industry

RATHER THAN THE FEDERAL TAXPAYER. THE FINANCING SYSTEM WAS TO BE SELF-SUSTAINING. MINE OPERATORS WERE REQUIRED TO PAY BENEFITS TO BLACK LUNG VICTIMS FOR WHOM THEY WERE LEGALLY RESPONSIBLE AND A TRUST FUND, FINANCED THROUGH A TAX ON COAL PRODUCTION, WAS ESTABLISHED TO PAY BENEFITS TO OTHER APPROVED CLAIMANTS.

CONGRESS REALIZED THAT THE TRUST FUND WOULD NOT BE SELF-SUSTAINING AT FIRST. THE PROVISION AUTHORIZING ADVANCES FROM THE TREASURY REFLECTED THE REALIZATION THAT THE COAL TAX RECEIPTS WOULD BE INSUFFICIENT DURING THE FIRST SEVERAL YEARS. THE SPONSORS ACKNOWLEDGED THAT THE COAL TAX MIGHT NOT PRODUCE SUFFICIENT REVENUES TO MEET THE NEEDS OF THE TRUST FUND. THE FLOOR MANAGERS OF THE BILL MADE IT CLEAR THAT, IF RECEIPTS WERE TO PROVE INADEQUATE, CONGRESS WOULD ADJUST THE TAX RATE.

AS YOU KNOW, MR. CHAIRMAN, IT HAS BECOME OBVIOUS THAT THE TAX REVENUES ARE NOT ADEQUATE. THE DEPARTMENT OF LABOR ESTIMATES THAT THE TRUST FUND WILL NEVER BECOME SOLVENT UNDER THE CURRENT TAX RATE. THE UMWA BELIEVES THAT IT IS ESSENTIAL TO CORRECT THIS SITUATION; WE MUST FULFILL THE CONGRESSIONAL MANDATE OF A SELF-SUSTAINING TRUST FUND BY RAISING THE COAL TONNAGE TAX.

THE BILL UNDER CONSIDERATION WILL SET THE TRUST FUND ON A PATH TO SOLVENCY BY DOUBLING THE CURRENT TAX RATE AND MAKING CHANGES IN THE INTEREST THAT COAL OPERATORS MUST PAY ON MONEY OWED THE TRUST FUND. DOL ESTIMATES THAT THESE REVENUE AMEND-

MENTS WILL ALLOW THE FUND TO CEASE BORROWING BY 1986 AND ACHIEVE SOLVENCY BY 1994. THE UMWA STRONGLY SUPPORTS THESE CHANGES.

IN ADDITION TO CHANGES IN THE TAX AND INTEREST RATE PROVISIONS WHICH ARE RELATED TO TRUST FUND CLAIMS, THE BILL PROPOSES TO AMEND CERTAIN ELIGIBILITY REQUIREMENTS FOR ALL FUTURE CLAIMS, INCLUDING RESPONSIBLE OPERATOR CLAIMS. THE PROVISIONS THAT ARE TO BE AMENDED ARE NOT RESPONSIBLE FOR THE TRUST FUND DEFICITS AND THEIR ELIMINATION WILL NOT ADD SUBSTANTIALLY TO THE EXPECTED DATE OF SOLVENCY. EXCESSIVE LEVELS OF RESPIRABLE DUST THAT CREATED HUNDREDS OF THOUSANDS OF BLACK LUNG VICTIMS ARE RESPONSIBLE FOR THE LARGE EXPENDITURES BY THE TRUST FUND; ONLY AN INCREASE IN REVENUE WILL ELIMINATE THE DEBT.

AFTER A CONSIDERABLE INTERNAL DEBATE ABOUT THE SERIOUS IMPLICATIONS OF A CONTINUING TRUST FUND DEFICIT, THE UMWA RELUCTANTLY HAS DECIDED TO CONDITIONALLY ACCEPT THE CHANGES IF THE FINAL VERIONS OF THE BILL IS CONSISTENT WITH THE INTENT OF THE ADMINISTRATION'S ORIGINAL PROPOSAL. THE RESOLUTION ACCEPTED BY THE EXECUTIVE BOARD WAS:

RESOLUTION

TO ALLOW THE COALITION SUPPORTING THE PROPOSED BLACK LUNG BILL TO PROCEED, WITH FINAL UMWA SUPPORT BASED UPON THE FOLLOWING CONDITIONS:

1. The final version of said bill
2. A reopening of the regulations that have lowered our approval rate from 30% to 7%
3. A position in favor of establishing and improving Black Lung Programs at the state level.

This decision was not an easy one for our union, but we believe the financial problems of the program must be solved. Secretary Donovan, in a recent letter to the Chairman of the House Education and Labor Committee, said: this legislation provides a solution to the long-term problems of the Fund, and should obviate the need to constantly revisit this matter each time there is a change in coal production or the economy in general." Concerning the changes in eligibility, Secretary Donovan stated "you are aware of the considerable criticism of the current black lung program, including that which continues to be made by the GAO. I would like to submit for the record an article written by Dr. Lorin Kerr, Director of the UMWA Occupational Health Department, concerning those criticisms. Although we disagree with those who have criticized the black lung program, we agree with the Administration that passage of this bill "will obviate the need to constantly revisit this issue." Our conditional support is based upon the belief that there will be no further

ATTEMPTS TO DISMANTLE THE PROGRAM OR MAKE IT MORE RESTRICTIVE.

WE UNDERSTAND THAT THE BILL PROVIDES FOR CONTINUED STUDY BY THE DEPARTMENTS OF LABOR AND HEALTH AND HUMAN SERVICES OF THE MEDICAL INFORMATION CONCERNING BLACK LUNG AND THE EXTENT OF DISABILITY THAT ARISES FROM THE DISEASE. WE HAVE RECEIVED ASSURANCES FROM THE ADMINISTRATION THAT WE WILL HAVE AN ACTIVE ROLE IN THIS PROCESS AND THAT OUR CONCERNS WILL RECEIVE SERIOUS ATTENTION.

OUR GREATEST CONCERN IS TO ELIMINATE THIS DREADFUL DISEASE. AS IS THE CASE WITH ALL OCCUPATIONAL DISEASES, BLACK LUNG IS MAN-MADE AND ERADICABLE IN ONE GENERATION. ALL WE HAVE TO DO IS TAKE A FEW SHORT STEPS FORWARD. ONE IS TO INSIST THAT RESPIRABLE DUST BE REDUCED TO A LEVEL THAT IS NOT DANGEROUS. THE CURRENT MANDATED LEVEL IS 2 MILLIGRAMS OF RESPIRABLE DUST PER CUBIC METER OF AIR -- AND CASES OF BLACK LUNG CONTINUE TO APPEAR. MSHA TELLS US THAT MORE THAN HALF OF THE NATION'S MINES CURRENTLY HAVE REACHED A LEVEL OF 1 MILLIGRAM. THE 1 MILLIGRAM LEVEL MEANS HEALTHIER AND MORE PRODUCTIVE MINERS. THAT LEVEL IS ACHIEVABLE AND DESIRABLE. IT SHOULD BE MANDATED.

A SECOND EASY STEP IS TO IMPROVE THE CURRENT SYSTEM OF PERIODIC CHEST X-RAYS OF WORKING MINERS. THREE MEASURES CAN AND SHOULD BE TAKEN:

1) THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH SHOULD MAKE THE CHEST X-RAY EXAMINATIONS OF ALL WORKING COAL MINERS.

2) X-RAY EXAMINATIONS SHOULD TAKE PLACE ON-SHIFT RATHER THAN BEFORE OR AFTER WORK SO THAT 90 PERCENT OR MORE OF THE MINERS WILL BE EXAMINED REGULARLY.

3) SURFACE MINERS AND AUGER MINERS SHOULD BE INCLUDED IN THE X-RAY PROGRAM.

THROUGHOUT OUR DISCUSSIONS WITH THE ADMINISTRATION ON THE ISSUE OF BLACK LUNG, WE HAVE ATTEMPTED TO IMPRESS UPON THEM THE IMPORTANCE OF PREVENTION. WE ARE PLEASED TO NOTE THAT THEY HAVE GIVEN SERIOUS CONSIDERATION TO THE ROLE OF PREVENTION AND HAVE DECIDED TO BEGIN JOINT LABOR-MANAGEMENT-MSHA REVIEW OF CURRENT ACTIVITIES TO REDUCE THE OCCURRENCE OF COAL MINE DUST.

WE BELIEVE THIS REVIEW, IN CONJUNCTION WITH THE DOL/HHS STUDIES, WILL DEMONSTRATE THE NEED FOR REDUCTIONS IN THE RESPIRABLE DUST LEVELS IN ORDER TO ELIMINATE BLACK LUNG. OUR HOPE, MR. CHAIRMAN, IS THAT THE NECESSARY PREVENTIVE STEPS WILL BE TAKEN SO THAT MINERS OF THIS GENERATION WILL NOT SUFFER THE HORRIBLE FATE OF THEIR FATHERS AND GRANDFATHERS.

THANK YOU.

Senator NICKLES. Thank you, Mr. Buckner. We appreciate your input on this piece of legislation.

Mr. BUCKNER. Thank you.

Senator NICKLES. As our next witness today, we have Frederick Webber, who is executive vice president of Government Affairs for the Edison Electric Institute.

Welcome, Mr. Webber.

STATEMENT OF FREDERICK L. WEBBER, EXECUTIVE VICE PRESIDENT, GOVERNMENTAL AFFAIRS, EDISON ELECTRIC INSTITUTE, ACCOMPANIED BY RON CLEMENTS, SENIOR LEGISLATIVE AFFAIRS OFFICER

Mr. WEBBER. Thank you, Mr. Chairman.

With me today is Ron Clements, who is a senior legislative affairs officer at Edison Electric Institute.

The hour is growing late, and so I will be brief and, in fact, will summarize my statement. What I intend to do is summarize the first six pages and then skip to the bottom of page 12. I will move as rapidly as possible and then we can get into the question and answer session.

This statement is submitted on behalf of EEI, which is the principal national association of investor-owned electric utilities. Its member companies serve approximately 66 million electricity consumers, comprising 99 percent of all customers of the investor-owned segment of the utility industry.

The EEI and its members have a direct and substantial interest in the procedures and funding of the black lung program because of the enormous amount of coal used by our member companies. Seventy-seven percent of all electric energy consumed in the United States is produced by investor-owned electric utilities, essentially by EEI members. That segment alone burns 68 percent of all coal produced in the United States.

Now, the black lung disability trust fund in only a few years has accumulated the staggering deficit of over $1 billion, and unless changes are made, this deficit will continue to grow. In our view, it is overly simplistic and wrong to approach the question of solvency by increasing taxes on coal until contributions catch up with benefits. As we shall show on the basis of our experience, any such increases will be costs ultimately paid by the electric consumer, your constituent.

Where, as here, the amount of benefits paid has expanded far beyond the expectations of Congress, the threshold questions are whether and to what extent deficiencies exist in the benefit system itself, and if so, whether their correction will remove or substantially lessen the deficit in the trust fund without the need to increase taxes on coal.

We applaud your subcommittee, Senator Nickles, for holding these hearings. We think it important that an explanation of the causes of the current deficit be presented in this forum because of the pivotal role of this particular subcommittee in the development of any legislation on this matter.

Before we turn to those matters, however, it is important to note the impact of any increased tax on coal, and subsequently, tax on your constituents. Although the so-called black lung tax is paid into the fund by the coal operator, as a practical matter, it is ultimately borne by the residential or business consumer of electric energy.

And incidentally, I was delighted to read in Senator Hatch's statement of today the fact that he acknowledged that EEI, representing the utility industry, will be sharing its thoughts on the impact of the proposed reform upon the consumer with whom we have direct contact on a nationwide basis.

The experience of my industry demonstrates that the coal operator, as part of his sales price, passes on some, if not all of the tax, as well as the administrative costs associated with it to his customer, the electric utility. Although there are some variations from State to State under existing regulations, the fuel adjustment clauses permitted the electric utility by the public utility commission generally provide that approximately 80 percent of the fuel costs are passed on to the consumer without the need for a rate hearing. The remaining 20 percent is generally subject to rate hearings before the State commissions, as you well know. The utilities experience a significant timelag before they can recover these increased costs. That is, the proposed tax on coal would ultimately not be paid by the coal operator, but by the electricity consumer and would have the further effect of exacerbating the already precarious financial health of the electric utility industry—not a very happy situation, I might add.

At present, the coal operator is responsible for collecting 25 cents per ton for surface-mined coal. Various formulas have been proposed for increasing these taxes. The latest proposal, S. 1922, doubles the existing tax rate; that is, raising the tax on surface-mined coal to 50 cents per ton and on subsurface-mined coal to $1 per ton.

The costs involved in this proposal are steep. Based on current projections, in 1982 investor-owned electric utilities are expected to consume 648 million tons of coal. If the tax proposed in S. 1922 is imposed for that year on both surface and subsurface-mined coal, this would amount to a total increase in the coal tax ultimately paid by the electric consumer of approximately $223 million. But that projected increase of $223 million understates by over $50 million the increase likely to be passed on to the ultimately electric consumer, for it admits electricity producers which are not investor-owned electric utilities. As previously noted 77 percent of the electricity production in the United States is generated by my membership at Edison Electric Institute, and again, our member companies consume 68 percent of the coal produced.

The remaining 23 percent of the electricity production is provided by essentially three groups in America—public power entities, such as TVA, world electric cooperatives and municipal power systems, such as those in Los Angeles and Jacksonville, Fla. Assuming these groups consume coal in the same ratio as the EEI members, their consumption would account for an additional 20 percent of the coal produced in any given year.

The inclusion of these groups would bring the total increase in cost to the consumer in 1982 to nearly $287 million. The increase in the coal tax attributable to this additional consumption is approximately $44 million. When added to the tax of $223 million allocable to the investor-owned utilities, the tax on coal for 1982 under S. 1922 would ultimately be borne by the electric consumer, and that will be nearly $267 million.

It is important to keep in mind that we have addressed only the costs of a tax on coal for trust fund purposes. Another substantial element of cost, however, emanates from the coal operator's direct liability to his own employees. This, too, will be reflected in the cost of producing the coal, and hence, in the price paid by the electric consumer.

Moreover, the amount of coal production will increase each year, reflecting the continuing shift from oil and gas to coal—something we are trying to do on an accelerated basis—and also reflecting the expected increase in the nation's need for energy.

The electric utility industry has projected that its consumption of coal will increase from the 573 million tons it used in 1980 to over 733 million tons in 1985, and over 927 million tons in 1989. Translated into increased taxes borne by the electric consumer, the prospects as far as we are concerned are indeed troubling.

The spiralling benefits paid under the act are equally troubling. Claims experience was analyzed by the Comptroller General, as you know, in 1980. The Comptroller General's report to the Congress of July 28, 1980, entitled, "Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability", reviewed claims approved by the Social Security Administration, one of the agencies authorized to review previously denied black lung claims as a result of more liberal standards created by the 1977 amendments to the Federal Coal Mine Health and Safety Act. The Comptroller General concluded that in over 88 percent of the cases in which the Social Security Administration reviewed and approved black lung claims, the evidence was not adequate to establish disability or death from black lung. This resulted, according to that GAO report, in retroactive lump sum payments of $312 million, and annual payments of $69.8 million, which were not based on adequate medical evidence of disability or death from black lung. What is perhaps most ominous is the Comptroller General's observation that this permissiveness did not arise through a failure of the Social Security Administration to obey the law. Rather, such license was mandated by the law itself.

We support the objectives of the Act, and want every present or former miner with a legitimate claim to receive the benefits to which he is entitled—I cannot say that strongly enough. But we believe, along with the Comptroller General, that benefits are all too frequently paid on unproven or otherwise improper claims. Much of the problem has arisen through an expansion of the term "miner," which in turn has extended coverage to persons who have no realistic exposure to black lung hazards.

In the next few pages, I go into the problems we have with the definitions, of "miner," "total disability" and "pneumoconiosis," and our recommendations as to how we think those definitions ought to change. I will not go into detail, but now refer you to the bottom of page 12 of my testimony.

Appropriately limited definitions will, we believe, go a long way toward removing the basis for unfounded claims or similar misuse of the benefit system.

We are keenly aware of the commitment of the Department of Labor to lower the claims approval rate, thus reducing an element of the fraud and misuse of the system. The Department is to be congratulated for reducing the approval rate from nearly 60 percent to the 10 to 15 percent range, according to our figures. Unfortunately, without definition changes in the statute itself, the claims approval rate could again climb to 60 percent or more under a subsequent administration controlling the Department. In short, only definition changes can assure that the black lung program will be restored to the original intent of the Congress.

In summary, what has happened is that a program designed to compensate miners for a serious infirmity arising out of employment in the coal mines has leaped far beyond that mandate and in the process has contracted an enormous deficit. The cure is not to pump billions of dollars into the trust fund, for the energy consumer should not be saddled with the burden of subsidizing a program which clearly has run wild. Instead, it is important to restore the black lung program to its original purpose. Once that is done, we believe that the deficit the fund now faces will be substantially diminished. In our judgment, it would be advisable to gauge experience under that arrangement without any preconception that financial solvency can be restored only through a substantial increase in taxes on coal and increases in taxes on consumers and your constituents.

We recognize, however, that a formidable alliance of the administration, elements of the coal industry working through the National Coal Association, the American Insurance Association and its members, as well as the United Mine Workers of America, all support S. 1922.

For the reasons cited during my testimony, however, we cannot support this bill. We have serious reservations whether a bill that has been before the Congress for less than a week, a bill which is unlikely to face the scrutiny of thoughtful committee markup in either the House or the Senate—and I think John Erlenborn made that quite clear this morning—should be dispositive of an issue as important as black lung reform. Our concern is further heightened by the passage of S. 1922 or similar legislation immediately prior to the release of a GAO report citing massive abuse in the black lung program.

If the Congress chooses to enact black lung reform legislation in this manner, the electric utility industry will not be an obstacle to its passage. And I would like to go on record by stating that all those reservations I have talked about notwithstanding, we will not play the role of obstructionist as this bill moves through the Congress on an expedited basis, and I gather that is the plan in the waning days of the first session of the 97th Congress. But the Edison Electric Institute urges this subcommittee not to permit the passage of S. 1922 or similar legislation from preventing the frequent and periodic review of the black lung program, and I think that is what Senator Randolph referred to earlier. Only such review can ameliorate, or perhaps lessen, the unjust tax burden being placed upon your constituents, upon our electric utility customers and consumers.

I am delighted that the Department of Labor this morning made reference to the fact that in the 18-month study under section 2(e) of the bill as presently constructed, a reexamination of the three definitions which I made reference to earlier will be conducted, and that along with the United Mine Workers and the insurance industry and the coal industry, that the investor-owned electric utility industry will help set the parameters of that study—in other words, perhaps on an unofficial basis, be part of that study and part of that report that will be submitted to the Congress 18 months subsequent to passage of the bill. We take that pledge from the Secretary of Labor seriously, and we understand that a letter to that effect from the Secretary to the chairman of the Senate Labor Committee and the chairman of the Senate Finance Committee will be forthcoming.

Finally, I would like to refer you to the chart at the end of my statement—it is not attached, but we will submit it separately for the record—the cost effects of S. 1922, the pluses and minuses, why the total 5-year cost exceeds $2 billion.

We welcome this opportunity to testify. I am sorry I took so long, but I stand ready to take questions.

[The prepared statement of Mr. Webber and chart referred to follow:]

TESTIMONY OF

FREDERICK L. WEBBER
EXECUTIVE VICE PRESIDENT
GOVERNMENTAL AFFAIRS
EDISON ELECTRIC INSTITUTE

On Behalf Of

THE EDISON ELECTRIC INSTITUTE

Before the

LABOR SUBCOMMITTEE OF THE
LABOR AND HUMAN RESOURCES COMMITTEE OF THE
UNITED STATES SENATE

December 14, 1981

STATEMENT OF
FREDERICK L. WEBBER

On Behalf Of
EDISON ELECTRIC INSTITUTE

My name is Frederick L. Webber. I am the Executive Vice President of Edison Electric Institute.

This statement is submitted on behalf of the Edison Electric Institute (EEI), which is the principal national association of investor-owned electric utility companies. Its member companies serve approximately 65,600,000 electricity consumers, comprising 99 percent of all customers of the investor-owned segment of the electric utility industry.

EEI and its members have a direct and substantial interest in the procedures and funding of the Black Lung program because of the enormous amount of coal used by EEI members. Seventy-seven percent (77%) of all electric energy consumed in the United States is produced by investor-owned utilities, essentially by EEI members. That segment alone burns sixty-eight percent (68%) of all coal produced in the United States.

The Black Lung Disability Trust Fund in only a few years has accumulated the staggering deficit of over one billion dollars, and unless changes are made this deficit will continue to grow. In our view it is overly simplistic and wrong to approach the question of solvency by increasing taxes on coal until contributions catch up with benefits. As we shall show on the basis of EEI experience, any such increases will be costs ultimately paid by the electric consumer. Where, as here, the amount of benefits paid has expanded far beyond the expectations of Congress, the threshold questions are whether and to what extent deficiencies exist in the benefit system itself, and if so, whether their correction will remove or substantially lessen the deficit in the Trust Fund without the need to increase taxes on coal.

We applaud your Subcommittee, Senator Nickles, for holding these hearings for consideration of the scope and procedures of the Black Lung Benefits Act. We think it important that an explanation of the causes of the current deficit be presented in this forum because of the pivotal role of this Subcommittee in the development of any legislation on this matter.

Before we turn to those matters, however, it is important to note the impact of any increased tax on coal. Although the so-called Black Lung tax is paid into the Fund by the coal operator, as a practical matter it is ultimately borne by the residential or business consumer of electric energy. The experience of EEI members demonstrates that the coal operator, as part of his sales price, passes on the tax as well as the administrative costs associated with it, to his customer, the electric utility. Although there are some variations from state to state, under existing regulations the fuel adjustment clauses permitted the electric utility by the public utility commission generally provide that approximately 80% of the fuel costs are passed on to the consumer without the need for a rate hearing. The remaining 20% is generally subject to rate hearings before the state commission. Utilities experience a significant time lag before they can recover these increased costs. That is, the proposed tax on coal would ultimately not be paid by the coal operator, but by the electricity consumer and would have the further effect of exacerbating the already precarious financial health of the electric utility industry.

At present, the coal operator is responsible for collecting $.25 per ton for surface-mined coal. Various formulas have been proposed for increasing these taxes. The latest proposal (S. 1922) doubles the existing tax rate, i.e. raising the tax on surface-mined coal to $.50 per ton and on subsurface-mined coal to $1.00 per ton.

The costs involved in this proposal are steep. Based on current projections, in 1982 investor-owned electric utilities are expected to consume 648,096,000 tons of coal, of which it is estimated that 403,163,808 tons will be surface mined, and 244,332,192 will be subsurface mined.1/ If the tax proposed in S. 1922 was imposed for that year on both surface and subsurface-

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1/ The source of the amount of projected coal consumption by investor-owned electric utilities is Table 10, 1980 Summary of Projected Peak Demand, Generating Capability, and Fossil Fuel Requirements of the Regional Reliability Councils of NERC, July 1980. The respective percentages of surface-mined and subsurface-mined coal assume the same division (62.3% surface mined, 37.7% subsurface mined) for the utility industry as is projected for the entire coal industry.

mined coal, this would amount to a total increase in the coal tax ultimately paid by the electric consumer of $223,000,000. Of that amount, approximately $101,000,000 would be attributable to surface-mined coal (403,163,808 tons at an additional $.25 per ton) and $122,166,000 to subsurface-mined coal (244,332,192 tons at an additional $.50 per ton).

But that projected increase of 223 million dollars understates by over 50 million dollars the increase likely to be passed on to the ultimate electric consumer, for it omits the segment of electricity producers which are not investor-owned electric utilities. As previously noted, 77 percent of the electricity production in the United States is generated by investor-owned electric utilities, which consume 68 percent of the coal produced. The remaining 23 percent of the electricity production is provided by essentially three groups, i.e., public power entities such as TVA, rural electric cooperatives, and municipal power systems, such as those in Los Angeles and Jacksonville, Florida. Assuming that these groups consume coal in the same ratio as the EEI members, their consumption would account for an additional 20% of the coal produced in any year.

The inclusion of these groups would bring the total increase in cost to the consumer in 1982 to nearly $207,000,000 million dollars. The increase in the coal tax attributable to this additional consumption is approximately $44,000,000. When added to the tax of $223,000,000 allocable to the investor-owned utilities, the tax on coal for 1982 which would ultimately be borne by the electric consumer is nearly $267,000,000.

It is important to keep in mind that we have addressed only the costs of a tax on coal for Trust Fund purposes. Another substantial element of cost, however, emanates from the coal operator's direct liability to his own employees. This, too, will be reflected in the cost of producing the coal, and hence in the price paid by the electric consumer.

Moreover, the amount of coal production will increase each year, reflecting the continuing shift from oil and gas to coal, and also reflecting the expected increase in the nation's need for energy. The electric utility industry has projected that its consumption of coal will increase from the 573,675,000 tons it used in 1980, to 733,124,000 tons in 1985, and to 927,850,000 tons in 1989.[2/] Translated into increased taxes borne by the electric consumer, the prospects are indeed troubling.

The spiralling benefits paid under the Act are equally troubling. Claims experience was analyzed by the Comptroller General in 1980. The Comptroller General's Report to the Congress of July 28, 1980, entitled "Legislation Allows Black Lung Benefits to Be Awarded Without Adequate Evidence of Disability," reviewed claims approved by the Social Security Administration, one of

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2/ These projections are based upon the Summary of Projected Peak Demand, etc., described in footnote 1.

the two agencies authorized to re-review previously denied black lung claims as a result of more liberal standards created by the 1977 amendments to the Federal Coal Mine Health and Safety Act. He concluded that in 88.5% of the cases in which the Social Security Administration reviewed and approved black lung claims, the evidence was not adequate to establish disability or death from black lung. This resulted, according to the Report, in retroactive lump sum payments of $312.9 million, and annual payments of $69.8 million, which were not based on adequate medical evidence of disability or death from black lung. What is perhaps most ominous is the Comptroller General's observation that this permissiveness did not arise through a failure of the Social Security Administration to obey the law. Rather, such license was mandated by the law itself.

We support the objective of the Act, and want every present or former miner with a legitimate claim to receive the benefits to which he is entitled. But we believe, along with the Comptroller General, that benefits are all too frequently paid on unproven or otherwise improper claims. Much of the problem has arisen through an expansion of the term "miner," which in turn has extended coverage to persons who have no realistic exposure to black lung hazards.

Although the original 1969 Act defined and thus conditioned the eligibility of a "miner" solely in terms of one who "is or was employed in an underground coal mine," the 1972 and 1977 amendments ballooned the definition to apply to persons working "in or around" a coal mine or coal preparation facility, transportation in or around a coal mine, or in coal mine construction. Specifically, the definition of miner contained in Section 402(d) now reads:

> (d) The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

A similar expansion of scope has been given to the definition of the disease for which compensation is being given. "Pneumoconiosis," which was initially defined to mean "a chronic dust disease of the lung arising out of employment in a . . . coal mine," now embraces "its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."

The result has been that workers with only the most remote exposure to coal dust, in occupations far removed from the conventional notion of coal mining, become eligible for benefits upon a showing of little more than respiratory ailments which are far more likely to have arisen from extensive cigarette smoking than the nature of their employment. Indeed, a representative of NIOSH so testified before the House Ways and Means Oversight Subcommittee in July of this year. Two examples from our industry readily come to mind. A person who rides in an air-conditioned vehicle which facilitates the unloading of unit trains would presumably be eligible for benefits under the Act. Similarly, a secretary who works in an air-conditioned office contiguous to a coal facility would appear to qualify. Because of the minimal nature of the proof needed to establish a claim, the fact that the persons in those two examples have virtually no exposure to coal dust in all likelihood would not be a bar to the granting of black lung benefits.

Accordingly, we would propose that the definition of miner be narrowed to respond to real rather than imagined perils. The deficiencies in the current definition of "miner" stem from vague standards in at least three areas: (1) employment not only in but "around" a coal mine or coal preparation facility; (2) inclusion of a coal preparation facility even if it is unconnected to a coal mine; and (3) inclusion of coal mine construction and transportation if there is the least bit of exposure to coal dust.

Specifically, we propose the following amendment to Section 402(d) of the Act:

> (d) The term "miner" means any individual who works or has worked in a coal mine or coal preparation facility in the extraction or preparation of coal to the extent such individual was exposed to coal dust as a result of such employment.

> Explanation: Pneumoconiosis results from prolonged exposure to high concentrations of microscopic particles of coal dust. This definition deletes material added in 1977 which expanded eligibility for benefits to individuals who do not work in such conditions such as transportation workers, persons who work outside the coal mine, and underground employees who are not exposed to dust in concentrations likely to cause pneumoconiosis. As a result of this change in the Act, eligible "miners" would be those individuals whose working conditions might reasonably be expected to have caused pneumoconiosis.

To bar unwarranted administrative expansion of this definition, we would also incorporate specific limitations in the language of Section 402(d). Thus we would propose that the definition expressly exclude supervisory and administrative functions which are not performed at the site of a coal mine, functions performed by clerical personnel, and the transportation of coal after it has been extracted and prepared.

Two other definitions, we believe, are in serious need of amendment. Specifically, the terms "total disability" and "pneumoconiosis" should be addressed. Section 402(f)(1) should be amended to read:

> The term "total disability" means the inability to engage in any gainful activity by reason of pneumoconiosis.
>
> (2) For purposes of paragraph (1)--
>
> (A) a miner shall be determined to be totally disabled only if his or her pneumoconiosis is of such severity that

he or she is not only unable to do his or her previous work, but cannot, considering his or her age, education, and work experience, engage in any other kind of substantial, gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he or she lives, or whether a specific job vacancy exists for him or her, or whether he or she would be hired if he or she applied for work. For purposes of the preceding sentence, "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(B) a miner shall not be considered to be under a disability unless he or she furnishes such medical and other evidence of the existence thereof as the Secretary may require. Any non-Federal hospital, clinic, laboratory, or other provider of medical services,

> or physician not in the employ of the Federal Government, which supplies medical evidence required and requested by the Secretary under this section shall be entitled to payment from the Secretary for the reasonable cost of providing such service.

Explanation: This new definition would conform the definition of "total disability" to that used under the Social Security Act. Currently, a miner is deemed to be disabled when he is unable to perform his coal mine job. The definition thus permits former miners to draw black lung benefits while holding full-time jobs. This new definition would prevent that from happening.

Please note that, even though S. 1922 would provide offsets for outside income, it would still not preclude a "disabled" black lung claimant from applying for and qualifying for black lung benefits. That is what this amendment would do.

Additionally, Section 402(b) should be amended to state:

> The term "pneumoconiosis" means a chronic dust disease of the lung found to occur as a result of employment in one or more coal mines or coal preparation facilities in the extraction or preparation of coal.

Explanation: This amendment deletes the language added in 1977, which expanded the definition of pneumoconiosis to include a broad range of respiratory diseases and conditions. Some of these diseases are neither fatal nor disabling. Many are a result, at least in part, of the miner's own conduct, such as cigarette smoking. The General Accounting Office testified before the House Ways and Means Committee's Oversight Subcommittee last July 27 that:

> We found claimants were awarded benefits for asthma or other respiratory conditions which, according to our medical advisor, may be aggravated but are not usually caused by coal mine employment.
>
> In addition, Labor awarded benefits to miners for respiratory conditions such as asthma and bronchitis which do not usually permanently damage the lungs. Once the miner is removed from the coal mine, the condition could improve or be eliminated.

By deleting the language added in 1977, Congress would be restricting eligibility to victims of pneumoconiosis alone. Please note, however, that the amendment still does not differentiate between simple pneumoconiosis, which is neither progressive nor disabling nor fatal, and the complicated form of the disease which displays all those characteristics. According to x-ray surveys conducted by NIOSH, this form of the disease is quite rare. Thus, the language, as amended, would still provide for a relatively generous compensation in that it would still allow benefits for anyone suffering from any form of the disease. In addition, it would leave the Department of Labor the leeway to provide by regulation for victims of other lung dust diseases, provided that the claimant could establish a nexus between his condition and exposure to dust in a coal mine or preparation plant.

Appropriately limited definitions will, we believe, go a long way towards removing the basis for unfounded claims or similar misuse of the benefit system.

We are keenly aware of the commitment of the Department of Labor to lower the claims approval rate, thus reducing an element of the fraud and misuse of the system. The Department is to be congratulated for reducing the approval rate from nearly 60% to the 10%-15% range. Unfortunately, without definition changes in the statute itself, the claims approval rate could again climb to 60% or more under a subsequent administration in the Department. In short, only definition changes can assure that the Black Lung Program will be restored to the original intent of Congress.

CONCLUSION

In summary, what has happened is that a program designed to compensate miners for a serious infirmity arising out of employment in the coal mines has leaped far beyond that mandate and in the process has contracted an enormous deficit. The cure is not to pump billions of dollars into the Trust Fund, for the energy consumer should not be saddled with the burden of subsidizing a program which has run wild. Instead, it is important to restore the Black Lung program to its original purpose. Once that is done, we believe that the deficit the Fund now faces will be substantially diminished. In our judgment it would be advisable to gauge experience under that arrangement without any preconception that financial solvency can be restored only through a substantial increase in taxes on coal.

We recognize, however, that a formidable alliance of the Administration, elements of the coal industry working through the National Coal Association, the American Insurance Association and its members, as well as the United Mine Workers of America all support S. 1922. For the reasons cited above, however, we cannot support this bill. We have serious reservations whether a bill that has been before the Congress for less than a week, a bill which is unlikely to face the scrutiny of thoughtful committee markup in either the House or Senate, should be dispositive of an issue as important as black lung reform. Our concern is further heightened by the passage of S. 1922 or similar legislation immediately prior to the release of a Government Accounting Office (GAO) report citing massive abuse in the Black Lung program.

If the Congress chooses to enact Black Lung reform legislation in this manner, the electric utility industry will not be the sole voice of opposition to its passage. The Edison Electric Institute urges this subcommittee, however, not to permit the passage of S. 1922 or similar legislation from preventing a frequent and periodic review of the Black Lung program. Only such review can ameliorate (or perhaps lessen) the unjust tax burden being placed upon the electric utility consumer.

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Cost Effect of DOL Black Lung Proposal, FY'82-'86
(Source: House Committee Print
Ways & Means Committee Print 97-22, 12/7/81, p. 27)

Proposed Changes	Cumulative Cost Effect (in $mil.)
Eliminating interim benefit awards	-5.6
Authorize re-reading x-rays	-53.1
Eliminating 25-year presumption	-2.1
Eliminating 15-year presumption	-33.2
Eliminating 10-year presumption	-4.8
Prohibiting benefits for unrelated deaths	-1.3
Applying earned income offset	-3.9
Subtotal: Cumulative benefit reduction	-104.0
Additional cost to fund - transferred claims	+220.2
Additional cost to operators - increased interest	+347.6
Additional estimated cost - tax increase[1]	+2000.0
TOTAL 5-year cost effect	+2463.8

1/ this number assumes a doubling of tax revenue based on 1980 coal production and does not take into account the fact that coal production may well escalate in each of the five fiscal years.

Senator NICKLES. I will compliment you, Mr. Webber, for not taking so long. We are very appreciative of your statement and also of your comments.

I do not know that the final scenario as far as passage of the legislation this current session in Congress has been totally resolved. It is also, certainly, my intention, and I think Senator Randolph's, too, regardless of whether or not this legislation is passed this week or next year or some other time, I would think that this subcommittee would certainly reserve our rights and also our duty to maintain and continue oversight, with possible legislative recommendations. Whether we are able to get all of them in now remains to be seen.

The gist of your comments primarily directed at S. 1922, were that it could be a successful piece of legislation if we could make those tightening of those definitions; is that correct?

Mr. WEBBER. I think if we had our "druthers," you would get into definition changes in that bill. I realize that politically, that is probably impossible. You know, we huddled in the White House on this matter, and none of my utility member companies really quarrelled about the amounts, about the fact that we are going to be facing a doubling of the tax, if you will. They are willing to do that, and that ought to be said for the record. They know that this deficit has to be taken care of, and it has to be done on an expedited basis.

But if we can accept at face value the Secretary of Labor's pledge that definitions will be studied, I think that will help the situation considerably. I have a couple of member companies—we have 200 all-told—but I have a couple who are very upset with the legislation. They come from coal mining areas, they burn a lot of coal, and they are less than happy with this, and they might try to play the role of obstructionist if this thing goes on fast track. That is not my recommendation to the membership; that is not my official position. Our position is plead with, this committee, this administration, to continue to reexamine those definitions.

Senator NICKLES. It is certainly my position that they certainly warrant our review, investigation and oversight. One thing about being in the Senate, and Senator Randolph, I have not been here nearly as long as you—but we find it is very easy to play obstructionist, if we so desire. That has a tendency to derail things that are on the railroad, going down the track, very quickly.

Mr. WEBBER. Well, I have always maintained that it is a heck of a lot easier up here—and I used to be a staffer up here—to kill a bill than to see one through. As Senator Randolph said earlier, not many reach the President's desk, do they, when you take a look at all the numbers. We do not want to play that game here; it is not our intent. But we do look for more perfection, and we are the lone ones out there, that I know of anyway, objecting to the language as presently constructed, and it puts us in a difficult position. But that is why we come forward with this very earnest plea on definitions.

Senator NICKLES. Aside from definitions, is there anything else substantially, Mr. Webber, that you feel is imperative to be examined in the near future?

Mr. **Webber**. Well, I wish the Department of Labor would be mandated to review X-rays. It says it may. But I think a second opinion—and I have been in many medical situations myself, especially recently, and second opinion is always a worthwhile exercise and adds legitimacy to a program such as this—a program, incidentally, which we believe in.

Again, I am not going to quarrel about the amounts, the doubling of the tax. We are going to have to pass it on to our consumers, again, your constituents, and it is substantial. When you add that, Senator Nickles, to what railroad deregulation has done to our industry, to the fact that there will be increases in waterway user fees, the fact that this administration does not support coal slurry pipeline—I have got to put you on notice, as we make projections on the consumption of domestic coal, this could be an added disincentive to the burning of domestic coal. I have got member companies right now, scrambling, looking for coal in South Africa and Europe. I do not like that. I want to see us burn more and more domestic coal. I want to see the mineworkers have an expanded, if you will, membership—something that was referred to earlier. We really have that magnificent domestic resource here, and we have got to be careful, as we are walking a tightrope, and we could price ourselves right out of the market, and you could see my membership looking elsewhere for coal.

Senator **Nickles**. When you mention that your membership might be looking to South Africa or other places for coal, is that because of the price and delivery?

Mr. **Webber**. A combination of factors, but today, you are looking right at price. We are in deep, deep trouble financially, as an industry, in case you have not read our advertisements. Some of our companies are at the brink, if you will. So the cost becomes very, very critical. And you know what has happened to nuclear recently. We are sort of treading water on that. And with increased electricity needs forecast for the future, we look to coal, as well as nuclear.

Senator **Nickles**. How do American coal prices—I realize there is quite a difference between surface coal in the West and underground coal in the East—but how does that compare, say, to the South African coal or any other imported coal?

Mr. **Webber**. Well, I will have to submit that for the record, but I am told by one co-op in Louisiana right now that they think they are in a position to purchase South African coal at a cheaper price than they can purchase domestic coal. That is deadly serious. That does not bode well for the industry, for the mineworkers, for all of us who would like to see more consumption of that great energy resource in this country.

Ron?

Mr. **Clements**. Senator, I might add, there is only one investor-owned electric utility in Florida presently burning coal, and they buy that from South Africa.

Senator **Nickles**. So that is a fact, that is currently happening today.

Mr. **Clements**. Yes, in South Florida, it is.

Senator **Nickles**. And that is primarily a function of price?

Mr. **Clements**. Yes, strictly price. In fact, you can get it unloaded, I think they said something like 20 percent more inexpensively.

Mr. **Webber**. Ron wanted to add something for the record, too, in terms of what else we would like to see in the legislation.

Mr. **Clements**. Yes. I think, as we said, we applaud what the Department of Labor is doing as far as getting the approval rate down, and going through and setting up a more stringent mechanism to deal with the problem, and we hope that they certainly do reach that 4 percent approval rate. I think what would help immensely to solve the problem in the future is, once you get to that point, to codify the regulations, so that we do not have to worry about many of the things that subsequent administrations could do that would escalate the rate.

Senator **Nickles**. Senator Randolph, do you have any questions?

Senator **Randolph**. Very quickly, Mr. Chairman.

I think I understand, Mr. Webber, from your standpoint the well-reasoned position you take—and I say that, well-reasoned. And you might not support the provisions of the bill as it is now before us, S. 1922; you support some of the provisions, perhaps?

Mr. **Webber**. Absolutely. We think it is a step in the right direction; yes.

Senator **Randolph**. You are thinking of a longer period of time coming to passage of a measure of this magnitude, let us say; is that correct?

Mr. **Webber**. Yes, sir.

Senator **Randolph**. And therefore, you would think in terms of next year rather than this year; is that correct?

Mr. **Webber**. Well, I suppose under ideal circumstances, I would like to see a bill get through before you adjourn in this first session. And to make those conditions more ideal, we would have language in there concerning the definitions we have cited. I think political reality dictates otherwise. I have been convinced by members of the administration and others that there is a chance that you are going to get this bill before you adjourn. I guess that depends on a jurisdictional battle on the other side of Capitol Hill. If that is the case, we as an industry will not stand in the way. If this does go over into the second session of the 97th Congress, we would like to come back and talk to you some more about definitions. But again, we do not want to play the obstructionist role.

Senator **Randolph**. And a final question on the doubling of the taxes. Does that worry you? The fund needs the money. If we double the taxes on coal, do you believe that is——

Mr. **Webber**. We are not here to quarrel about that, Senator. That fund does need the money. We have got to get out of that deficit situation. We know that——

Senator **Randolph**. The deficit problem is there, it has to be solved.

Mr. **Webber**. Absolutely, and we understand why the administration is supporting the bill because, really, that is one of their ultimate objectives, to get that thing back in the black again. We support that. You know where the money is coming from better than anybody in this room. So that is why we are trying to be constructive in our approach. That is why we have given this bill careful analysis. I will leave it at that.

Senator RANDOLPH. I thank you and your associate very much, Mr. Webber.

Senator NICKLES. Thank you very much, Mr. Webber. We appreciate your testimony. Mr. Clements, thank you for your statement.

On our final panel today, we have Andrew Kalmykow, consultant for the American Insurance Association, in New York, who is accompanied by Howard Bunn, vice president of the National Association of Independent Insurers, Chicago; and also, Tom O'Day, government relations officer of the Alliance of American Insurers, Washington, D.C.

Gentlemen, we welcome you to the committee. I hope that you realize that by "batting cleanup," that your testimony is nonetheless very much appreciated, and we look forward to what you have to say.

STATEMENT OF ANDREW KALMYKOW, CONSULTANT, AND FORMER ASSISTANT GENERAL COUNSEL, AMERICAN INSURANCE ASSOCIATION, ACCOMPANIED BY J. HOWARD BUNN, VICE PRESIDENT, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, CHICAGO, ILL., AND TOM O'DAY, GOVERNMENT RELATIONS OFFICER, ALLIANCE OF AMERICAN INSURERS, WASHINGTON, D.C.

Mr. KALMYKOW. I would like to commend you, Mr. Chairman, for your dedication to this very important subject, as evidenced by your continued presence here today and that of Senator Randolph, who has contributed so much to this subject over the years.

My name is Andrew Kalmykow. I am presently consultant and prior thereto was assistant general counsel with particular responsibility for workers' compensation for the American Insurance Association, a national organization of casualty and property insurance companies.

It is my great pleasure to have with me Mr. Howard Bunn, vice president of the National Association of Independent Insurers, who I might say was former director of the interdepartmental task force on workers' compensation and is past chairman of the Industrial Commission of North Carolina; and Mr. O'Day, who is also very knowledgeable in this field and whose organization has contributed a great deal to the progress of workers' compensation over the years.

I believe that between these organizations, we represent companies that write close to 95 percent of workers' compensation being written in this country by insurance companies.

Member companies of our association are vitally interested in the satisfactory operation of the workers' compensation system, including the Federal Black Lung Benefits Act.

I had the privilege of serving as a member of the National Commission on State Workmen's Compensation Laws that was created pursuant to act of the Congress, and studied the operation of the workers' compensation system throughout the United States. In these capacities, I had the opportunity of observing closely the development and operation of the Federal black lung program from its very inception. A detailed legislative history of that program is appended to my statement.

Very serious financial and administrative problems have developed under that program. The legislation under consideration, that is S. 1922, is intended to remedy at least some of these difficulties. We believe that enactment of this legislation is desirable from the viewpoint of industry, labor, and the public.

In your consideration of this measure, a brief review of the development that caused these problems may possibly be helpful. They, I believe, are the consequence of the creation of a well-intentioned but hastily conceived compensation system without initially adequate study or hearings. It was originally part of the Federal Coal Mine Health and Safety Act. The main concern then centered on those subjects. Very limited attention was given to the black lung benefit provisions. As a matter of fact, the bill as reported by this committee did not contain any such provisions initially. These were added on the floor of the Senate as a compromise to an unrelated point of order.

The law, as we know it today, was initially drafted by the Conference Committee. It bore little resemblance to the provisions of the bill as originally passed by either the Senate or the House. While the Senate and House measures differed, they were both limited in scope and, in essence, were to be a State administered program with Federal grants. The bill reported by the Conference Committee adopted a completely different approach. It provided that claims made prior to January 1, 1973, subsequently changed to July 1, 1973, were to be presented to the Social Security Administration and paid out of general revenue. These, known as part B claims, presumably were to cover cases involving long past exposures. Claims filed after these dates, known as part C claims, were to be the responsibility of coal operators and their insurers. It was contemplated that these claims would involve either current or at least recent exposures. This responsibility was to be met under State workers' compensation laws, but only if the latter were amended to conform with certain Federal requirements. Among these requirements were some of the provisions that have caused serious difficulties under the Federal act. Some States attempted to comply with these requirements but, before they could do so, new ones were added. No State has been found to be in compliance today. In absence of such compliance, benefits are payable under the Federal act as administered by the Labor Department.

The conference report—it is interesting to note those dates—was made on December 16, 1979. It was agreed to in the House on the very next day, and in the Senate on the 18th.

Although the Labor Department indicated opposition to these provisions, it was approved on December 30, 1969 and became effective on that day. Immediately, serious problems developed. The Social Security Administration had the obligation to meet an unexpected responsibility for which they were totally unprepared and of which they had no prior notice. They were overwhelmed with claims. An overall total of 40,000 to 54,000 had been expected, and some felt that even this figure was exaggerated, as was said when the bill was under consideration. The incidence of complicated pneumoconiosis, the disabling form of black lung intended to be compensated, is relatively limited. It affects 3 percent or less of active miners, and at that time, approximately 9 percent of nonactive miners. Instead, almost 100,000 claims were filed in the very first month. Through June 30, 1973, 547,218 applications had been filed.

Serious delays occurred. Complaints proliferated. In 1972, legislation was enacted greatly liberalizing already broad eligibility requirements and increasing the scope of beneficiaries. It was felt that the processing of claims would be accelerated in this manner. Certain inequities in the law such as failure to provide benefits for orphans were also corrected.

However, these amendments, instead of providing a remedy, merely aggravated the problems. Eligibility and other changes were made retroactive, so that thousands of claims that had been denied now had to be reviewed and reopened in light of these amendments; 180,000 claims had to be reviewed, and more delays resulted. Since benefits were being paid out of public funds, little attention was paid to those who raised questions concerning the soundness of the program.

In 1973, administration claims became the responsibility of the Labor Department. It had been expected that, by now, at least the bulk of the claims involving old exposures which had occurred many years ago would have been filed. This did not prove to be the case. Over 92,000 new claims were filed by June 1976. Most of these involved old exposures and difficult medical questions. It was also difficult to locate responsible operators. The law and regulations meant financially responsible operators, and these included both subsequent and prior mineowners. The former may never have actually had in their employment the miners involved in the claims. Again, delays developed.

In 1977, further amendments resulted. Once more, the scope of beneficiaries and eligibility requirements were greatly broadened. Again, these provisions were made retroactive. Again, vast numbers of claims previously denied, either by the Social Security Administration or the Labor Department, had to be reviewed again, but by an obscure provision, responsibility for these reopened claims was placed upon the responsible operators and their insurers, even for claims that had originally been made and denied by the Social Security Administration. This was accomplished by what looked like a technical amendment which provided that the date of application for reopening was to be considered the date of filing of the claim. As previously indicated, the dividing line between part B and part C claims was the date of filing. The reopenings now presumably were the obligation of the responsible operators where these could be found, and presumably, their insurers. These provisions are now the subject of litigation, and I believe there is one decision, at least, that holds that this is not the responsibility of part B claims, a third circuit decision.

Insurers and coal mine operators are now faced with an obligation they did not have when they issued their policies or when the claim was made. This is akin to changing the methods of scoring after the game is over. Winners suddenly become losers. Insurers did not receive premiums for a liability which then did not exist.

It must be noted that in view of the broad presumptions and definitions contained in the law and various other rules that have been established, benefits must be paid to many coal miners who were not disabled from black lung, or their survivors. Again, I make reference to that study by GAO that was referred to earlier, in which in approximately 88.5 percent of the cases, medical evidence was not adequate to establish disability. The report emphasizes that these approvals were not contrary to law but were mandated by various provisions of the act. These provisions included a requirement of a finding that disability or death be established on the basis of affidavits of spouse or other dependents, use of inconclusive medical evidence or presumptions based on years of coal mine employment.

As part of the same legislative package, a trust fund financed by a tax on coal was also created to pay claims of miners and their survivors whose last employment occurred before January 1, 1970. The fund was also liable in the case of claims where there is no operator required to secure benefits or while a claim is in litigation.

If retroactive application is to be given to these provisions, it is equitable to place this liability upon the whole coal industry. This would be accomplished by making the trust fund responsible for claims previously denied but now found eligible. The current legislation is at least, in part, designed to accomplish this. I say "in part" because the date of denial is established as March 1, 1978, and "denial" is defined as claims that have been denied 1 year before that, so this would not include all claims pending and subject to review.

The bill would also make some desirable changes, on a prospective basis, concerning eligibility requirements and the financing of the trust fund.

We respectfully urge favorable consideration of this measure.

We greatly appreciate the opportunity of appearing here before you today, and hope that our remarks and the appended material will be helpful to you and your committee in your deliberations.

[The prepared statement of Mr. Kalmykow follows:]

STATEMENT OF
AMERICAN INSURANCE ASSOCIATION
ON S. 1922
BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE SENATE COMMITTEE ON LABOR
AND HUMAN RESOURCES

DECEMBER 14, 1981

My name is Andrew Kalmykow. I am presently Consultant and prior thereto was Assistant General Counsel with responsibility for Workers' Compensation for the American Insurance Association, a national organization of casualty and property insurance companies. Member companies of that Association write approximately 50% of workers' compensation written by insurance companies throughout the country. They are vitally interested in the satisfactory operation of the workers' compensation system including the Federal Black Lung Benefits Act.

I had the privilege of serving as a member of the National Commission on State Workmen's Compensation Laws, created pursuant to act of the Congress, which studied the operation of the workers' compensation system throughout the United States.

In this capacity, I had the opportunity to observe closely the development and operation of the Federal Black Lung Program from its inception. A detailed legislative history of that Program is appended to my statement for the record and members of the Subcommittee.

Very serious financial and administrative problems have developed under the Black Lung Program. The legislation under consideration here today is intended to remedy at least some of these difficulties. We believe that enactment of this legislation is desirable from the viewpoint of industry, labor and the public.

In your consideration of this measure, a brief review of the development of these problems may be helpful. They are the consequences of the creation of a well-intentioned but hastily conceived compensation system without initially adequate study or hearings. The Black Lung Benefits Program was originally part of the Federal Coal Mine Health and Safety Act. Very limited attention was given to the black lung benefit provisions. As a matter of fact, the bill as reported by this Committee did not address this issue.

The law, as we know it today, was initially drafted by the Conference Committee. It bore little resemblance to the provisions as originally passed in either the Senate or the House. While the Senate and House measures differed, they were both limited in scope and, in essence, were to be administered by the state under federal grants. The bill reported by the Conference Committee provided that claims made prior to January 1, 1973 (subsequently changed to July 1, 1973) were to be presented to the Social Security Administration and paid out of general revenue. These, known as Part B Claims, presumably were to cover cases involving long past exposures. Claims filed after these dates, known as Part C Claims, were to be the responsibility of coal operators and their insurers. It was contemplated that these claims would involve either current or at least recent exposures. This responsibility was to be met under state workers' compensation laws, but only if the latter were amended to conform to certain federal requirements. These requirements were among some of the provisions that have caused serious difficulties under the federal act. Some states attempted to comply with these requirements, but, before they could do so, new ones were added. No state has to date been found to be in compliance.

In absence of such compliance, benefits are payable under the federal act as administered by the Labor Department.

The Conference report was submitted on December 16, 1969. It was agreed to in the House on December 17 and in the Senate on December 18. Although the Labor Department indicated opposition to these provisions, it was approved on December 30, 1969 and became effective on that day. Immediately, serious problems developed. The Social Security Administration had the obligation to meet an unexpected responsibility for which they were totally unprepared and of which they had no prior notice. They were overwhelmed with claims. An overall total of 40,000 to 54,000 claims had been expected. The incidence of complicated pneumoconiosis, the disabling form of black lung intended to be compensated, is relatively limited. It affects three percent or less of active miners and approximately nine percent of nonactive miners.* Instead, almost one hundred thousand claims were filed in the first month. Through June 30, 1973, 547,218 applications had been filed.

Serious delays occurred. Complaints proliferated. In 1972, legislation was enacted greatly liberalizing already broad eligibility requirements and increasing the scope of beneficiaries. It was felt that the processing of claims would be accelerated in this manner. Certain inequities in the law such as failure to provide benefits for orphans were also corrected. However, these amendments, instead of providing a remedy, merely aggravated the problems. Eligibility criteria and other modifications were made retroactive so that thousands of claims that had been denied now had to be reviewed in the light of these amendments. One hundred eighty thousand claims had to be reopened, and more delays resulted. Since benefits were being paid out of public funds, little attention was paid to those who raised questions concerning the soundness of the program.

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* Pneumoconiosis in Appalachian Bituminous Coal Miners, by W.S. Lainhart, et al, Public Health Service Publication number 2,000, 1969, U.S. Department of Health, Education and Welfare, Superintendent of Documents, Washington, D.C. See also Mineral Resources and the Environment, Supplementary Report, Coal Workers' Pneumoconiosis - Medical Considerations, Social Security Implications, National Academy of Sciences (1976) p. 46-47. As of December, 1974, there were 118,700 coal miners; in December, 1975 181,800 coal miners; and in 1939 there had been 454,056.

In 1973, Administration claims became the responsibility of the Department of Labor. It had been expected that all or at least the bulk of claims involving old exposures which had occurred many years ago would have been made. This did not prove to be the case. Over ninety two thousand new claims were filed by June 30, 1976. Most of these involved old exposures and difficult medical questions. It was also difficult to locate responsible operators which included both subsequent and prior mine owners. In many instances, the former may actually never have had in their employment the miner involved in the claim. Again, delays developed.

In 1977, further amendments resulted. Once more the scope of beneficiaries and eligibility requirements were greatly broadened. Again, these provisions were made retroactive. Again, vast numbers of claims previously denied, either by the Social Security Administration or the Labor Department, had to be reviewed. Liability for these reopened claims was placed upon the responsible operators and their insurers, even for claims that had originally been made and denied by the Social Security Administration. This was accomplished by what looked like a technical amendment which provided that the date of application for reopening was to be considered the date of filing of the claim. As previously indicated, the dividing line between Part B and Part C claims was the date of filing. The reopenings now presumably were the obligation of the responsible operators where they could be identified. This provision is now the subject of litigation. Insurers and coal mine operators are now faced with an obligation they did not have when they issued their policies or when the claim was made. This is akin to changing the methods of scoring after the game is over. Winners suddenly become losers. Insurers did not receive premiums for a liability which then did not exist.

It must be noted that in view of broad presumptions and definitions contained in the law and various other rules that have been established, benefits must be paid to many coal miners who were not disabled from black lung. A report by the Comptroller General to the Congress dated July 28, 1980, H.R.D. 80-80, p. 1, after reviewing claims originally denied by the Social Security Administration but subsequently reviewed and approved, found that "in 88.5% of cases, medical evidence was not adequate to establish disability or death from black lung." The report emphasizes that these approvals were not contrary to law but were mandated by various provisions of the Act. These provisions included a requirement of a finding that disability or death be established on the basis of affidavits of spouse or other dependents, use of inconclusive medical evidence or presumptions based on years of coal mine employment.

A trust fund financed by a tax on coal was also created to pay claims of miners and their survivors whose last employment occurred before January 1, 1970. The fund was also liable in the case of claims where there is no operator required to secure benefits or while a claim is in litigation.

If retroactive application is to be given to these provisions, it is equitable to place this liability upon all of the coal industry. This would be accomplished by making the trust fund responsible for claims previously denied but now found eligible. The current legislation is at least, in part, designed to accomplish this. I say "in part" because the date of denial is established as of March 1, 1978 and thus would not include all claims pending and subject to review. The bill would also make some desirable changes, of prospective application, concerning eligibility requirements and the financing of the trust fund.

We respectfully urge favorable consideration and prompt action for S. 1922.

I hope that our remarks and the appended material will be helpful to your Subcommittee in your deliberation.

Respectfully submitted,

Andrew Kalmykow

Andrew Kalmykow
Consultant
American Insurance Association

Senator NICKLES. Thank you very much, Mr. Kalmykow. We appreciate your comments.

Just one question concerning the transferring of claims and how that would apply. I understand where the industry is coming from in saying that this should not be our liability because there are retroactive benefits——

Mr. KALMYKOW. Well, not only retroactive, but those were claims originally made against the Social Security Administration and denied by them and were never supposed to be the responsibility of any individual operator or their insurance carrier, for that matter. It was never contemplated.

Senator NICKLES. Well, granted, it certainly was not contemplated, I guess, for all operators. But thinking of the self-insured operators—and I think I have heard the figure that about one-half of the operators were self-insured on black lung—should those self-insured, independent operators be allowed to transfer those liabilities over to the trust fund?

Mr. KALMYKOW. Well, as I indicated, you know, the responsible operator is not always the person who employed the particular individual; it may be a successor down the line. And as I say, it has been the responsible operator that has been defined. And they would pay the increased tax on coal so they would not only pay an increased contribution in any event, but would also have to pay their individual responsibility under this law, which is sort of the luck of the draw, so to speak. So there would be double taxation, so to speak, on those particular people.

Senator NICKLES. Do you feel like there is going to be a lot of responsible operators that will be transferring their liabilities over to the trust fund who will be, say, benefiting in relationship to the overall industry?

Mr. KALMYKOW. Well, we hope we know what the figures are currently. As I understand it, our best estimates are that as far as part B claims are concerned, there are about 8,000 of those. Responsible operators who never should have been responsible and never contemplated that they would be and I do not think people realized at the time that that provision—and it possibly would not be so construed by the courts—that it had retroactive effects.

Now, the part C claims, I understand, with this 1-year provision, only about 2,000 claims would be transferred, so it is not a very large amount compared with the total.

Senator **Nickles**. Senator Randolph?

Senator **Randolph**. I can understand that you have direct interest in this legislation, the American Insurance Association. I am intensely interested, as our chairman is interested, in the views of people such as you on the transfer provision of the proposal. Is it 10,000 claims that would be transferred from responsible operators, and their insurance, to the trust fund?

Mr. **Kalmykow**. Under this particular measure that is being proposed, there would be about 8,000 under part B claims, and only about 2,000 under part C claims.

Senator **Randolph**. About 10,000 total?

Mr. **Kalmykow**. Yes, roughly.

Senator **Randolph**. What is the value of this provision to the insurance industry?

Mr. **Kalmykow**. Well, I am not completely certain how many of these would be self-insured and how many insured; that would make a difference. We are not always aware, since there is a delay in advising the responsible operators after the first division. So we had a lot of difficulty trying to find out exactly what our responsibility is. That is a matter of serious concern. But as far as the actual individual cost of additional borrowed money, as I understand, it would only be about $20 million for the coming year, and if a tax system is proposed, the contributions to the fund would balance out after that first year.

Senator **Randolph**. What companies would benefit by the provision that you have been addressing?

Mr. **Kalmykow**. Well, I do not know if it is exactly a benefit, because they are being saddled with a responsibility that they did not have and should not have. As I say, it is like a score game, and they are being charged with something they did not contemplate—no insurance was contemplated at that time for this liability; it just did not exist at that time. So it is not a question of benefiting as providing an equitable solution to what should never have been contemplated in the first place.

Senator **Randolph**. I see. We thank you for your testimony.

Senator **Nickles**. I would like to follow up that question. Did the insurance industry or any individual insurer go to court and say this is ex post facto, that you cannot impose retroactive liabilities on them?

Mr. **Kalmykow**. As I say, there was one case where the court agreed with the insurer. It was the *Kimball* case, in the third circuit. There are many other cases, but I do not know what the ultimate decision will be.

Senator **Nickles**. Was the disposition of that where the insurer itself was not liable, or where the law was found unconstitutional?

Mr. **Kalmykow**. As I believe, it was held that the insurer was not liable, under its policy, for that obligation.

Senator NICKLES. Did they find that the operator was liable in that case?

Mr. KALMYKOW. I believe so. This is a report I have. I have not seen the decision yet.

Mr. BUNN. Excuse me. There is a case pending in Kentucky which is attacking the constitutionality of this provision. It is still underway. They are taking depositions and building the record, and it probably will ultimately have some impact on whether the law is upheld. It has not come down it; it is still pending.

Senator NICKLES. Is it still in Federal district court?

Mr. BUNN. Yes, in Kentucky.

Senator NICKLES. That is a legal question that will have an interesting impact on all concerned. To complete the same thing that I was saying, I have had estimates that this transfer might equal as much as $1.4 billion over the life. Is that correct?

Mr. O'DAY. It depends on how you figure the value of those cases, Senator. I think what the National Commission has given you is their best figure of what will have to be done immediately, in terms of additional borrowing authority from the Treasury and then how that goes year by year. The $1.5 billion figure is if you had to put reserves away today, like the insurance industry does, that is the kind of money that would have to be put away to pay for those cases over the life of them and their dependents.

Senator NICKLES. Those 10,000 cases?

Mr. O'DAY. Right.

Senator NICKLES. So the actuarial equivalent of their present value today would be something like $1.4 billion——

Mr. O'DAY. Right.

Senator NICKLES [continuing]. Which, being transferred into the fund, takes that liability away from, that is the self-insured, independent, responsible operator and/or the insurance carrier and puts that onto the whole pool of operators to fund over the life?

Mr. O'DAY. Industry as a whole, that is right. But as Andy was trying to stress there, I think, it was never intended to be their liability, the responsible operators or their insurance carriers, in the first place. Particularly the old social security cases, which is the great bulk of those cases that we are talking about, 80 percent of those, it was never contemplated that there would be a responsible operator for those cases. Those cases were always to be paid out of general revenues and handled by social security. What has happened through 1977 is that they have been removed from general revenues and are now being put to the responsibility of the industry as a whole. It was never contemplated that they would be the responsibility of specific operators or their carriers.

Senator NICKLES. Gentlemen, there has been a lot of discussion on definitions. Do you concur with the statement that the definitions should be tightened up? Do you think the compromise agreement should be adopted with further looking at the definitions at a later date, or do you have strong feelings one way or another?

Mr. KALMYKOW. Well, I think it would be helpful to get what there is in the bill at the present time, and I think further study to determine the desirability and the nature of the changes would be warranted.

Senator NICKLES. Senator Randolph, do you have any additional questions?

Senator RANDOLPH. Only this observation, Mr. Chairman. It is my understanding that there is no formal report to go from this subcommittee to the full committee, but just the process of hearings; is that correct?

Senator NICKLES. That is for you and I to decide. The administration is contemplating passage this year, and here again, you are more aware of the system than I am, and any Senator could stop this bill from being passed this year at their prerogative. They will have to have unanimous consent agreement to take it not even out of our subcommittee or the full committee, but directly to the floor. It can only be done by unanimous consent if we are going to get this through this year, and of course, that could be objected to by any Senator, and basically impede enactment of this at this particular time, this week.

Senator RANDOLPH. It is my understanding that we will go out on Wednesday, but I may be in error.

Senator NICKLES. That is the latest that I have heard, and that is subject, of course, to change, but that is the goal, I think, as set up.

Why don't we visit about this a little more?

Senator RANDOLPH. Yes; I think that is appropriate. Perhaps I should not have raised it, but I was just wondering the way in which we would terminate this hearing process. It has been very helpful, I am sure, to me, and I am certain that you have profitted by the testimony given by different groups and individuals here.

Senator NICKLES. It has been very helpful to me and very enlightening—very enlightening to the extent of the problem and also to possible avenues of approach. I guess a weekend review of the background legislation on this, of the whole scope of the problem, is certainly a step in the right direction. The question would be whether additional changes should be made or not, and I think everyone concurs with the fact that we need to do something about the fund, and we need to provide benefits to those persons who are legitimately disabled. We will certainly work together to come up with those common goals, and whether or not that means passage in the next couple of days, that is still, I think, pretty much our decision to make, and I will be happy to work with you on that.

Senator RANDOLPH. Thank you, and I want to cooperate fully. There will be a printed copy of this hearing, will there not, and it will be available?

Senator NICKLES. There will, and it will be available. We will also keep the hearing record open for the next 2 weeks for additional comments and questions by subcommittee members and to give our panelists time to submit the detailed information that we both requested.

Senator RANDOLPH. My final comment, and I am grateful that I can make it without reference to any considerations other than to look back for a moment and to think of what can happen in the future to not one piece of legislation, but to many pieces of legislation through the years. I want to add to the hearing record this quote from the President of the United States, Franklin Roosevelt who, after serving his first term, being elected in 1932—the year in which I was elected as a Member of the House of Representatives—

but he was renominated, as we know, and reelected in 1936. But in that acceptance speech for his second term of the Presidency, he gave these remarks, in part:

> Governments can err, Presidents do make mistakes, but the immortal Dante tells us that divine justice weighs the sins of the coldblooded and the sins of the warmhearted in different scales. Better the occasional faults of a Government that lives in the spirit of charity than the consistent omissions of a government frozen in the ice of its own indifference.

So, having quoted those words, I want to return to the year 1969. We were at that time attempting in a warming kinship, as it were, within the Congress and the administration, to bring forth legislation, perhaps faulty in degree, but legislation that seemed to touch not only the dollars involved, but the very heart of an industry which was dependent upon those miners who, in a hazardous profession, brought forth the energy which then and now and during the interim has fueled America, has in a sense brought to the consuming public here and abroad the product that has been vital to the growth of the United States.

I am not speaking as any spokesman for coal, although I believe in it, and its use, and its greater uses. It can be burned cleanly and supplied to Americans, and yet that is a matter of concern and debate. But in that period of 1969, without reference to politics, I think in a sense, Mr. Chairman, we were carrying out that legislative intent, which was hopefully realistic, but also based in a warmhearted approach.

Thank you.

Senator NICKLES. I thank the Senator very much for those comments and for his interest in this today, throughout the day. You have stayed with us all day, and I am appreciative of that and appreciate of the input you have given us, and I look forward to continuing working together to reach our common objectives.

Senator RANDOLPH. I will want to do that, of course. Thank you.

Senator NICKLES. At this point I order printed all statements of those who could not attend and other pertinent material submitted for the record.

[The material referred to follows:]

U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

DEC 23 1981

Honorable Donald L. Nickles
Chairman
Subcommittee on Labor
Committee on Labor and Human
Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I wish to express to you again my appreciation for the personal interest you have taken in reform of the Black Lung Program and for your leadership in co-sponsoring S. 1922, the "Black Lung Benefits and Revenue Amendments of 1981."

In Deputy Under Secretary Robert B. Collyer's testimony before the Labor Subcommittee on December 14, 1981, he discussed the two legislative studies that the Department will conduct under the new Black Lung Law. One of these studies will explore "the nature and extent of impairment and disability that are attributable to the existence of both simple and complicated pneumoconiosis." This study, together with appropriate recommendations, is to be tramsmitted to the Congress no later that 18 months after the enactment date.

In discussions that we have held with the groups specifically concerned with the new law, we have said that this study would include an examination of three important definitions which were a matter of substantial debate: the definitions of "pneumoconiosis", "miner", and "total disability".

Concern about these definitions was specifically raised in testimony presented to the Labor Subcommittee by Frederick L. Webber, Executive Vice President for Governmental Affairs of the Edison Electric Institute, which represents investor owned electric utilities. Mr. Webber strongly urged that these definitions be changed in S. 1922.

As you know, we had discussed these issues at some length with Mr. Webber and other representatives of the Edison Electric Institute prior to his testimony and had indicated to them that while we did not believe it appropriate to amend any of these definitions in the bill, we did believe that their concerns ought to be addressed in our legislative study.

We have also told representatives of the electric utility industry that we would seek their direct involvement in this study, as well as involvement of other affected parties such as the coal industry and United Mine Workers' Union. I believe that this is an equitable procedure for addressing a difficult matter and would hope that this letter expressing our views on it could be made a part of the hearing record.

Sincerely,

Raymond J. Donovan

Raymond J. Donovan

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•Executive Committee
†Honorary

December 14, 1981

The Honorable Don Nickles
United States Senate
Washington, D.C. 20510

Dear Senator Nickles:

The American Mining Congress is gratified that you and your co-sponsors, Senators Hatch, Randolph and Heinz, have introduced S. 1922, a bill to amend the Black Lung Benefits Reform Act.

We are encouraged that the Senate Labor Subcommittee is conducting this hearing for the purpose of expedited consideration of the bill. We believe that S. 1922 is an important first step toward correction of the underlying deficiencies in the black lung program. And, since budgetary constraints argue strongly for immediate reform of the program, we recognize that complete and more controversial reform may have to be delayed until a later date. We therefore endorse the bill.

The American Mining Congress is a national trade association which represents the producers of most of America's metals, coal, industrial and agricultural minerals. As such, the health and safety of all who work in the mines is of the highest concern to our industry. We have, therefore, an abiding interest in the black lung benefits program. With that thought in mind we urge a return of the black lung program to its intended purpose -- compensation for death or total disability due to coal workers' pneumoconiosis (black lung).

Through amendments in 1972 and again in 1977, the eligibility criteria have loosened, allowing many without adequate medical evidence of black lung to receive benefits. As a result of these loosened criteria and laxities in the Department of Labor's administration of the black lung benefits program, the Black Lung Disability Trust Fund is currently insolvent.

The Fund should be made solvent, but any tax increase must go hand in glove with reform of the benefits provisions of the existing law.

Continued. . .

Enclosed as an attachment to this letter is a statement listing needed reforms to the Black Lung Benefits Act. It is our belief that these changes are essential to restore solvency to the Fund on a continuing basis. S. 1922 incorporates many, but not all, of the reforms we have recommended. In addition, we note that insofar as substantive changes are concerned, the bill is only prospective in nature and will not be applied retroactively to cure past and continuing abuses.

In our view, these changes should be made immediately and apply to all claims not yet finally adjudicated, or to any potential claimants whose rights have not yet vested. For example, the bill would not affect unrelated death benefits for any case in which the miner has already filed a claim. The potential survivors of these miners have no vested rights in benefits, and if a miner's death does not stem from black lung, there is no reason to provide black lung benefits to survivors.

As for funding, currently the tax rate is $.25/ton for surface mined coal and $.50/ton for underground coal, limited by a two percent sales price ceiling. We note that S. 1922 would double this tax to $.50/ton and $1.00/ton for surface and underground coal, respectively. The tax ceiling would also be doubled to four percent. It is AMC's position that this ceiling remain at two percent for surface mined coal. In addition, AMC stresses that any tax increase be effective only until the Trust Fund becomes solvent.

We would also note that computer models and projections have in the past not always been accurate -- as has been demonstrated by the ongoing analysis of the Federal budget. So too, we point out that the Department of Labor's model illustrates that not only would the Trust Fund's $1.5 billion deficit be eliminated by the proposed tax, but a $6 billion surplus would be created after the increase is repealed.

Nevertheless, to the extent that S. 1922 constitutes an achievable method of attaining solvency of the Trust Fund through at least partial legislative reform of the black lung eligibility criteria, we endorse the bill.

Our support of the bill, however, must be conditioned upon achieving substantive changes to the statutory eligibility criteria and receiving a firm commitment from the Department of Labor that it will also cure the administrative deficiencies in the program.

Continued. . .

To reiterate, we urge a return of the black lung program to its intended purpose -- compensation for death or disability due to coal workers' pneumoconiosis. The only way to achieve this purpose is to address the root cause of the problem of the program by rewriting its substantive provisions. The opportunity is at hand to achieve the balance needed in this program -- a balance based on credible evidence and encompassing both compassion and common sense.

We look forward to working with you to achieve a balanced Trust Fund and to prevent the continued unwarranted black lung payments which have led to the Fund's insolvency.

Mr. Chairman, I ask that this letter and its attachment, in their entirety, be made a permanent part of the record for the Senate black lung hearings.

With warmest personal regards, I am

Sincerely,

J. Allen Overton Jr.

J. Allen Overton, Jr.
President

Attachment

Statement Of
The American Mining Congress
Before The
United States Senate
Labor and Human Resources Committee
Subcommittee on Labor
December 14, 1981

Introduction

The members of the American Mining Congress (AMC) sincerely appreciate this opportunity to discuss with you the causes of the insolvency of the Black Lung Disability Trust Fund.

AMC is a national trade association founded in 1897 which represents the producers of most of America's metals, coal, industrial and agricultural minerals and the manufacturers of mining and mineral processing machinery, equipment and supplies. As such, we represent producers of most of the nation's coal.

We are gratified that the black lung program is finally getting the comprehensive review it urgently needs.

The Black Lung Disability Trust Fund is currently insolvent. The American Mining Congress supports placing the trust fund on a sound financial footing. Unfortunately, efforts to date have been focused on increasing the tax on coal rather than on correcting the core deficiencies in the present law. It is our belief that the insolvency of the trust fund results from the unsound eligibility criteria of the present black lung law, along with a generally lax administration of the program, in part caused by the Department of Labor, but in large part by the requirements of the law.

Only after the deficiencies of the present black lung program are corrected can the actual liability of the Black Lung Disability Trust Fund be assessed. Therefore, we would urge Congress first to tighten the program's current overly-broad criteria, and then to conduct an actuarial study to determine the program's future liabilities. Only then can the appropriate methods for achieving solvency of the fund be determined.

Coal workers' pneumoconiosis (CWP), commonly known as "black lung," is a chronic disease of the lungs, caused by the long-term inhalation of coal dust. The disease is progressive and latent and requires many years of excessive dust exposure to develop. It was not until the 1950's that CWP was medically recognized as a disease in the United States.

In passing the 1969 Federal Coal Mine Health and Safety Act, Congress chose a two-pronged solution to the difficult issues presented by the tragic occurrence of CWP in our nation's coal mines. First, it created an interim compensation program because many state workmens' compensation laws did not recognize occupational illnesses. Second, it mandated maximum coal dust exposure standards which would protect miners from contracting CWP. The Congressional intent was clear: a short-term compensation program for miners who are disabled by CWP and a preventive occupational health law aimed at eliminating CWP from the nation's coal mines.

Efforts to Reduce the Incidence of CWP

The 1969 Act established maximum coal dust exposure standards based on British epidemiological studies which concluded that exposure over a miner's working lifetime at no more than the mandated levels would reduce the incidence of CWP to almost zero. Congress reasoned that this would essentially preclude all new miners from contracting CWP.

As an additional protection, in order to protect miners working at the time of the passage of the Act, Congress created medical surveillance programs; and, to prevent further advancement of the disease, miners with the slightest evidence of CWP were given the right to transfer, without loss of pay, to areas of the mine with extremely low dust concentrations.

The 1969 Act established a 3 milligrams of dust per cubic meter of air (mg/m^3) dust exposure standard for the three years following its passage. Thereafter, the Act required maximum exposures of 2.0 mg/m^3, a standard for which conclusive proof exists that over a working lifetime only a small fraction of one percent of miners would contract CWP.

As a result of significant strides in dust control techniques, by 1973 the average dust concentration in underground coal mines was 1.9 mg/m^3. By 1980, this level had been reduced to 1.1 mg/m^3, far better than the 2.0 mg/m^3 statutory standard which is known to prevent CWP even after 30 years of exposure. The cooperative efforts of industry and government which resulted in dust control technology advances along with the medical surveillance and transfer programs, will virtually eliminate the incidence of CWP in the future.

Failure of the Compensation Program

The dramatic success of dust control efforts stands in stark contrast to the financial insolvency of the Black Lung Disability Trust Fund.

The compensation program, initially aimed at providing compensation to totally disabled miners not covered by state law, was amended in 1972 and again in 1977. Disability or impairment as a precondition for compensation was eliminated. The present statutory provisions in most instances allow automatic compensation for miners who have worked a prescribed number of years. As such, the disability program has for all practical purposes become a pension program. Under existing laws and regulations, regardless of advances in dust control, regardless of the success of the medical surveillance and transfer programs, and regardless of the ultimate disappearance of CWP as an occupational disease in the United States, compensation will continue at a cost unparalleled by any other occupational disease compensation program in the history of the United States.

The central shortcoming of the existing program is highlighted by the Comptroller General's report, entitled "Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability" (HRD-80-81, July 28, 1980). According to this report, 88.5% of the claims reviewed by GAO which had been approved by the Social Security Administration did not contain adequate medical evidence to establish disability or death from CWP. Testimony by the Comptroller General in July of this year indicates a similar percentage of inadequately proven claims were approved by the Department of Labor.

These unproven claims were approved according to existing law. The statute contains certain presumptions that allow compensation without the need to prove disability or death from CWP. Unless Congress acts to amend the substantive provisions of the black lung program, benefits will continue to be awarded long after CWP disappears from the nation's coal mines.

Presumptions

There are two presumptions in the law which will result in the continuation of black lung claims regardless of the actual incidence of the disease.

There is a presumption that a miner died from black lung if his death resulted from a respiratory disease and he worked in a mine for at least 10 years.

Similarly, there is a statutory presumption that a miner's total disability or death was caused by black lung if there is at least a 15 year employment history and any other evidence demonstrating the existence of respiratory or pulmonary impairment.

These presumptions were enacted so as to address the dilemma of survivors who, because of the absence of any relevant medical evidence regarding the physical condition of deceased miners, could not establish a valid claim. The presumptions were to give the benefit of the doubt to survivors of miners who died many years ago, in cases where medical evidence was non-existent.

However, these presumptions have outlived their purpose. Medical science has developed to the point where black lung can be detected with accuracy. In addition, the claims of miners intended to benefit from this provision have been adjudicated. Thus, the continuation of these presumptions results in expansion of eligibility far beyond those miners disabled by coal workers' pneumoconiosis.

Definitions

In addition to the overly-broad eligibility criteria created by the statutory presumptions, there are several statutory definitions which have further broadened the number of persons eligible for benefits.

First, the law was changed in 1972 to include surface miners, whereas it had previously been limited to underground miners.

Second, the term "total disability" was redefined so that a miner would be considered totally disabled if his pneumoconiosis prevented him from engaging in gainful work which requires skills and ability similar to those he used while working in the mines. This allows miners who have been transferred to less rigorous work to be eligible to claim total disability.

The law was again changed in 1977 when miners voiced objections that claims were being denied because a miner was working at the time he made his claim. Now, employed miners are eligible to apply for benefits, so long as they retire within one year of the determination of eligibility. This provision is totally confusing. A miner should not be considered totally disabled (under common meanings of the term) when he is still gainfully employed in a coal mine.

In 1977, the definition of miner was again expanded. "Miner" now includes those who work in coal mine construction and transportation in addition to those who work in and around a coal mine or coal preparation plant. Thus, under current law, individuals with little or no actual coal mining experience have been awarded benefits.

For example, in 1979, a survivor's claim was approved for the widow of a man who died from heart disease. He had worked a sum total of three weeks underground as a miner. However, for 46 years he had worked as a mine-clerk in offices located on mine property. Because of the liberal definition, his widow was able to qualify for benefits under the 25-year presumption of coal mine employment. Other claims have been approved for persons employed as laboratory technicians.

The term "miner" should be redefined so that only those people who actually mine coal or who work in or around a coal preparation facility be included, and then only those workers who are actually exposed to dust.

Pneumoconiosis, once a medical term, was also expanded by the 1977 Amendments. The new definition expands the term from a chronic disease of the lung caused by coal dust, to include respiratory and pulmonary impairments arising out of coal mine employment. This expansion has allowed for the award of benefits to miners with asthma, bronchitis and emphysema; diseases which are common in the general population and have no relationship to mining coal.

The original purpose of the Act was to provide a "one shot compensation deal" to underground coal miners totally disabled by black lung. However, this intent has changed significantly. In the 1972 and 1977 Amendments, far reaching changes were made, resulting in a complete overhaul of the Act. We urge Congress to amend the definitions in order to compensate only those who are truly disabled by CWP.

Rereading of X-Rays

Another result of the 1977 Amendments was the provision prohibiting the government from rereading a claimant's x-ray if read by a radiologist or technician and of good quality. The rationale behind this prohibition was that too many claims were being denied on the basis of rereading of x-rays by government experts. Thus, under current law, if a qualified local physician makes an initial x-ray examination, finding the existence of black lung, there is no way the Federal government can require another reading absent clear cases of fraud.

This is an extraordinary provision which denies the government the use of experienced, trained lung x-ray readers (B-readers), to insure that the initial reading was correct. There have been numerous cases where one or more B-readers have read a miner's x-ray as negative for black lung. However, because of the prohibition against rereading of x-rays, benefits were paid from the trust fund based merely on the claimant's personal physician's reading. As Senator Chafee so aptly stated in floor debates on the provision, "It seems to me that that is a most extraordinary deprivation of the Government's right to protect the taxpayers of this Nation." (Legislative History, p. 1053).

Several examples of claims approved in this manner were documented in the GAO report.

Use of Affidavit Evidence

The 1977 Amendments expanded the use of affidavits to establish a claim in the case of a deceased miner where no other relevant medical evidence exists. The rationale behind this provision was to compensate the survivors of miners who died from black lung before the disease was recognized as such. However, today medical science has become sophisticated enough to prove or disprove the existence of black lung. Thus, the use of affidavits as sole establishment for valid claims is no longer viable.

The provision has, regrettably, led to extensive abuse. Those who will benefit most are often the ones who submit an affidavit. The GAO found that in 68 of the 78 cases studied (87 percent), the person who signed the affidavit attesting to the miner's physical impairment was the person who filed the claim and received the benefits. Statements by survivors saying that a miner "coughed and spit," had "miner's asthma" or had "shortness of breath" were accepted as proof of disability when medical evidence was not available. This provision is probably one of the most common reasons that the GAO concluded that 88.5% of its random sample of claims were not supported by adequate medical evidence of disability.

Affidavits, because of their potential for fraud, should never alone be dispositive of a claim. If allowed at all, they should be used only as a supplement to all other relevant evidence.

Unrelated Death Benefits

Because of the broad eligibility criteria, survivors (spouses, dependent children, brothers, sisters and parents) may apply for and receive black lung benefits without having to prove that the miner died from pneumoconiosis. This further illustrates that the program has digressed beyone a disability program and has become a pension program with full survivors benefits. Regardless of the cause of death, if a miner had some disability due to black lung, his survivors can collect benefits. Coupled with the eligibility presumptions, the resulting situation is that an operator or the Department of Labor must prove that the miner did not have black lung.

Several examples which illustrate this problem are:

- -- In 1980, a widow's claim was approved based on her deceased husband's 12 years of coal mine employment. The miner died as a result of being run over by a tractor operated by one of his own sons on the family farm. The autopsy report indicated that there was some evidence of CWP. However, reexamination of the evidence by an expert in CWP diagnosis indicated that the amount of dust accumulation in the lungs was no more than would be found in the lungs of individuals living in an urban environment. However, because of the use of the 10 year presumption, the miner's widow was able to qualify for benefits.
- -- A miner with 36 years employment died from a heart attack while on vacation. The autopsy report indicated that the deceased had also suffered from severe emphysema. The widow's claim for black lung benefits was approved based on the use of the presumptions in the law.

Change is needed -- the law should be restructured to require survivors to prove that the death of the miner was a direct result of CWP. Otherwise, the trust fund will continue to provide what is in effect a pension program to survivors, awarded primarily on the basis of years of employment rather than death or disability due to black lung.

Offset of Other Benefits

Currently, Federal black lung benefits are offset only by payments from a state black lung program. Other types of workers' compensation or disability benefits are not required to be offset against the black lung payments. Because of this, a miner in effect can be disabled twice. This "double-dipping" is a privilege afforded few other workers.

Payment of Retroactive Benefits Before Final Adjudication

Another large drain on the trust fund is the practice of awarding all benefits to the claimant immediately following an initial entitlements decision. Presently 45-50% of the initial awards are reversed at final adjudication. A reversal requires the government to attempt to retrieve all funds paid out, a practice which is extremely difficult, even when a good faith effort is made. The Act should be amended to prohibit payments to the claimant until final adjudication of the claim.

Indexing

Currently, benefit payments are tied to the Federal civil service wage scale (½ of GS-2). These benefits are increased annually, resulting in an automatic inflation index. Since the black lung benefits were originally intended as a supplement to income rather than a sole source of income, the indexing provision is inappropriate and only results in greatly increasing the cost of the program.

Administration

Finally, we submit that much of the insolvency of the present trust fund is a result of administrative difficulties encountered by the Department of Labor in its attempt to interpret conflicting and ambiguous legislation. In the past, the Department of Labor's "interim" regulatory criteria for approving claims were even broader than the statutory provisions. Furthermore, under prior Administrations, the Department of Labor appeared more interested in approving claims than defending against them. In fact, in the majority of cases, the Department often failed to even appear, much less defend.

Notwithstanding the recent changes in the criteria for review of claims which have resulted in their improved handling, the underlying cause of the insolvency of the trust fund still exists. The insolvency of the trust fund will continue until such time as Congress undertakes a complete review of the existing legislation and adopts appropriate corrective legislation.

Conclusion

The American Mining Congress supports benefits for miners who are disabled by coal workers' pneumoconiosis: The issue is whether Congress is going to continue to allow those with no evidence of disease to collect black lung benefits.

The reason we are here today is that the trust fund is insolvent. We submit that this is because of the overly-broad eligibility criteria and lax administration of the law. A tax increase alone will not solve the problem nor cure the deficiencies in the law which led to the insolvency.

Testimony was presented in July that the number of Black Lung Trust Fund claims will significantly decrease in future years. This is true because the trust fund is primarily responsible for claims in which no mine operator is found to be responsible for claims; and in the future, mine operators themselves will be responsible for a far greater number of claims. However, unless the statutory framework is changed, these operators will still be liable for the same type of claims which have been responsible for the present insolvency of the trust fund. Ultimately, it is the consumers who will continue to pay for unfounded claims, resulting in the price of energy continuing to add to the inflationary spiral.

If a Congressional remedy is limited to increasing the tax, the inequities in the law will still exist -- inequities to the coal producer, his customers, and ultimately the consumer. The overly broad presumptions and definitions in the Act must be changed; criteria which allow a miner (or his survivors) to collect, regardless of the cause of death, regardless of disability, regardless of adequate medical evidence. The problems of this program under the present statute will continue regardless of the strides in dust control, regardless of the medical surveillance and transfer programs and regardless of the ultimate elimination of CWP from our nation's coal mines.

The statutory presumptions and definitions require immediate attention. The Comptroller General's report is an irrefutable indictment of the existing statute. The evidence is clear and convincing. A tax increase without substantive amendments is a "Band-Aid" and not a cure. Our economy cannot tolerate a continuation of the old ways. Our taxpayers deserve better treatment. We urge a return of the black lung program to its intended purpose: Compensation for death or disability due to coal workers' pneumoconiosis. The only way to truly solve the problem at hand is to address the substantive provisions of the black lung program.

Thank you again for the opportunity to present our views on this important legislative issue.

Statement of Martin A. White
Vice President and General Manager, Western Energy Company
Before the
Committee on Labor and Human Resources
United States Senate
Re
S1922, Black Lung Benefits Program

Western Energy is a Montana-based Corporation with operating surface coal mines at Colstrip, Montana and Grass Creek, Wyoming. Our operation at Colstrip, Montana is our largest mine and will produce 10,500,000 tons in 1981. Our total payments to the Black Lung Trust Fund in 1981 will be approximately $1,900,000.

While this tax payment is a significant amount for a small company such as ours, the future costs implications of the Black Lung problems on our Company, its customers and in turn, their customers will cause this cost to pale by comparison. The purpose of my testimony today will be to provide you with the perspective of my Company, a Western U. S. surface mining company, on the Black Lung problem situation and its solution.

The Federal Black Lung Program is the perfect example of Government out of control. Acting upon worthy sentiments in 1969, Congress chose a two-pronged solution to the difficult problem represented by "Black Lung" disease. "Black Lung" is pneumoconiosis, a progressive chronic disease of the lungs caused by long-term inhilation of coal dust. The prevalence of Black Lung in our nation's coal workers was a tragic occurrence and action was appropriately taken by Congress. First, Congress created a purportedly temporary program because many state workmens' compensation laws did not recognize occupational illnesses. Second, Congress mandated maximum coal dust exposure levels which would protect miners from contracting Black Lung. The Congressional intent was clear; first a short-term compensation program for miners who are disabled by Black Lung and who had no recourse to a state compensation program or to a disability insurance program provided by their employers. Secondly, a preventative occupational health law aimed at eliminating Black Lung from the nation's coal mines.

In funding the compensation program, however, Congress created the seed of what proved to be the fatal blow in the Black Lung solution. The decision was made not to fund the compensation program from general revenues but rather from an earmarked excise tax on the sale of coal. Apparently operating on the mistaken impression that the excise tax would produce unlimited revenues, and since, in any event the program would not constitute an obligation against the Federal Treasury, Congress unrealistically expanded the coverage of the program and created preposterous eligibility criteria. Then, succeeding administrations, through tax administration, removed any last vestage of chance that the program might succeed.

There is no better proof of the utter failure of the compensation program than the Government's own Comptroller General's report, entitled "Legislation Allows Black Lung Benfits to be Awarded Without Adequate Evidence of Disability" (HRD-80-81, July 28, 1980). 88.5% of examined claims approved by the Social Security Administration did not contain adequate medical evidence to establish disability or death from Black Lung. Testimony by the Comptroller General in July of this year indicates a similar percentage of approved claims by the Department of Labor without adequate medical evidence.

On the positive side, steady progress has been made in the initial objective of reducing dust exposure levels in the nation's mines. As a result of significant strides in dust control techniques, by 1973 the average dust concentration in underground coal mines was, according to Government data republished by the American Mining Congress, 1.9 mg/m^3. By 1980, this level had been reduced to 1.1 mg/m^3, far better than the 2.0 mg/m^3 statutory standard which is known to prevent CWP even after 30 years of exposure. The cooperative efforts of industry and government which resulted in innovative dust control technology, along with a medical surveillance and transfer program, will essentially eliminate the incidence of Black Lung in the very near future.

Despite the progress toward eliminating the disease, the Black Lung Disability Trust Fund is insolvent. Outstanding liabilities against the fund are still increasing and proposals now under discussion would create a 100% increase in the tax levels imposed on coal production. More importantly, the Black Lung Legislation would permanently impose the cost of a wasteful and extravagant benefit program on the coal industry. The legislation requires the coal producer to provide for a benefit program for the workers identical to the one now provided by the Government for workers who do not have recourse to an employer or state provided program. The coal producer has the choice of meeting this federally mandated obligation through self-insurance, private coverage or State Workmen's Compensation coverage. The states, due to the unrealistic expense inherent in the federal program, have not exhibited any willingness to allow coal producers to meet their potential obligation through state agency programs. Only one state has done so to date. Since private insurance coverage is available only at exorbitant rates, i.e., 13% to 26% of payroll costs, most producers are presently self insuring, which merely postpones but does not alleviate the problem. If the Black Lung Compensation Program is not to become a permanent impediment to the nation's coal industry, Congress must act to drastically change the program.

Western Energy Company, as a responsible Company, supports benefits for miners disabled by coal workers pneumoionious. Western, as a responsible Company, is willing to pay the full cost of a benefit program for workers who contact the disease as a result of being employed in our operations. Western is even willing, albeit reluctant, to pay a fair share of the cost of paying benefits of disabled workers who have no other recourse. The two issues from the viewpoint of Western Energy Company, as a Western U.S. surface mining company are, first, whether Congress is going to continue to allow those with no evidence of disease to collect Black Lung benefits, and second, whether Congress is going to continue to impose the cost of what is really a general obligation on a specific industry which has had no part in creating that obligation.

Relative to the first issue, this is our position:
The reason we are here today is that the Trust Fund is involvent. We submit that this is because of the overly broad eligibility criteria and lax administration of the law. A tax increase alone will not solve the problem. It may help to balance the Trust Fund, but it will not cure the deficiencies in the law which led to the insolvency.

While it is true that the number of Black Lung Trust Fund claims will significantly decrease in future years the real cost of the benefit program will continue to rise unless benefits are reconciled with need. The Trust Fund is primarily responsible for the claims in which no mine operator is found to be responsible for the claims. In the future, however, mine operators themselves will be responsible for a far greater number of claims. Unless the statutory framework is changed, these operators will be liable for the same type of claims which have been responsible for the involvency of the Trust Fund. The taxpayers, who are the ultimate consumers of our products, will continue to pay for unfounded claims and the price of energy will continue to add to the inflationary spiral.

You can balance the Trust Fund by increasing the tax, but the inequities of the law will still exist -- inequities to the coal producer, his customers, and ultimately the consumer. It is the overly broad presumptions and definitions in the Act which must be changed; criteria which allow a miner (or his survivors) to collect, regardless of the cause of death, regardless of disability, regardless of adequate medical evidence. This so-called "compensation" program will continue under the present statute regardless of the strides in dust control, regardless of the medical surveillance and transfer programs and regardless of the ultimate elimination of Black Lung from our nation's coal mines.

It is the statutory presumptions and definitions which require immediate attention. The Controller's General's report is an irrefutable indictment of the existing statute. The evidence before you is clear and convincing. A tax increase without substantive amendments is a "bandaid" and not a cure.

In regard to the second issue, it is our position that the surface mining industry is all ready paying a disportionate share of the Black Lung Compensation Program. The incidence of Black Lung disease is totally unrelated to surface mining activities. The 2.0 mg/m^3 test concentration standard is virtually never exceeded in surface mining work areas and 30 years of this level of exposure are considered safe. The likelihood of contracting Black Lung disease through employment in a surface mine is roughly comparable to becoming an alcoholic from being employed growing malt crops for the beer industry.

Yet, surface mined coal is presently subject to a maximum tax of $0.25/ton to support the Black Lung Program. The incidence of the disease depends on the number of people exposed to dust concentrations. Surface mining operations pay a disportionate amount of the total tax compared to the number of personnel employed. Coal Outlook, the coal industry publication of McGraw Hill, publishes a quarterly productivity report in the coal industry using Department of Labor source data. For the second quarter of 1981, that publication listed the productivity for U.S. underground mines at 10.2 tons per man-day; for U.S. surface mines at 35.2 tons per man-day and for Montana surface mines at 119.6 tons per man-day. Translating these productivity numbers into Black Lung payments, we find that a) average United States underground producer pays $0.50/ton x 10.2 tons = $5.10 of Black Lung tax per man-day; b) the average United States surface producer pays $0.25/ton x 35.2 tons = $8.80 of Black Lung tax per man-day; c) the average Montana surface mine pays $0.25/ton x 119.2 tons = $29.90 per man-day.

The Western United States surface mine producers are paying six times the rate of tax that the average underground producer pays, when considered in light of the number of workers exposed to any dust contamination, even as slight as the disease related danger actually is in Western surface mines. It is imperative that the tax burden on Western surface mined coal not be increased to an even more unfair level.

Thank you again for the opportunity to present our views on this important legislative program.

Report on Federal Black Lung Legislation

by

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American Insurance Association

July 30, 1981

Background

Serious financial and administrative problems are presently facing the Federal Black Lung Program. They indicate the consequences of creating a well-intentioned, but hastily conceived, compensation system without adequate study or hearings. In the Senate, it was originally proposed and adopted as a floor amendment to the Federal Coal Mine Health and Safety Act.

Difficult problems surfaced immediately upon enactment. Amendments intended to be remedial have served instead to aggravate the situation. To understand present concerns, it is helpful to know how the program was created and how it has developed.

Report on Federal Black Lung Legislation

Original Enactment - 1969

On November 20, 1968, a mine explosion in West Virginia killed 78 men. This provided very strong impetus for the enactment of federal coal mine safety and health legislation. While sentiment in favor of such legislation was strong, there was considerable difference of opinion as to its form and content. This was the first major federal enactment on industrial safety and health. Interest centered not only on safety but on health as well, including elimination of dust hazards.

Senate Action

The bill in the Senate neither as introduced nor as reported by the Committee on Labor and Public Welfare (S. 2917, 91st Congress, 1st Session) on September 17, 1969 contained provisions for compensation for coal workers' pneumoconiosis, now commonly known as black lung (Legislative History, Federal Coal Mine Health and Safety Act, Committee on Education and Labor, House of Representatives, 91st Congress, 2nd Session, March 1970, Committee Print). That disease had been mentioned at the hearings but this was primarily from a health standards viewpoint. The question of compensation was not at issue and was not addressed by persons especially interested and informed on this aspect of the subject.

The bill as reported created a Research Trust Fund (Title V) to be supported by a graduated assessment ranging from 1 to 4 cents per ton of coal. A point of order was raised concerning this provision on the ground that a tax measure could not originate in the Senate (P. 260, Legislative History, supra). In the meantime, a floor amendment was proposed by Senator Randolph for grants in aid to states for temporary limited compensation benefits to coal workers totally disabled from complicated pneumoconiosis (P. 321, Legislative History, supra) payable until January 30, 1972. The Secretary of HEW was, in the meantime, to make a study. Question was raised as to the propriety of the point of order. As a compromise, compensation provisions were substituted for the Trust Fund in Title V under unanimous consent, which prevented further amendment (P. 333, Legislative History, supra). The amendment was then adopted by a vote of 90 ayes, 0 nays.

Finally, after considering a great many other amendments, the bill (S. 2917) was passed on October 2, 1969 by a vote of 73 ayes, 0 nays (P. 516 ff, Legislative History, supra).

The bill, as passed in the Senate, included the compensation provisions. As indicated above, as part of the compromise on the tax point of order issue, the compensation provisions could not be amended. This provision was similar to that originally proposed by Senator Randolph but the period of payment was increased to January 30, 1973 when they were to terminate. The federal government's contribution for such benefits under agreement with the states, which would administer the program, would be 100% the first two fiscal years and 50% of the benefits for the following two years. Standards of eligibility were to be set by the Secretary of HEW who would immediately undertake the study. The dimension of the program contemplated is indicated by an appropriation of $10 million for the balance of the first fiscal year and for the second year and $30 million for the next two years but not to exceed $15 million annually. These figures may be compared with the more than a billion dollars a year now being paid.

House Action

In the House, extensive hearings had been held on Coal Mine Health and Safety by the General Subcommittee on Labor of the House Committee on Education and Labor (P. 560, 561, Legislative History, supra). Here again, the main thrust of the hearings was on health and safety, not compensation. The Select Subcommittee on Labor of the House Committee on Education and Labor had held some hearings on several bills relating to compensation for pneumoconiosis (H. R. 9850, H. R. 10215, H. R. 10259, H. R. 10267 and H. R. 10421) but these were limited in scope. The primary subject of those hearings was H. R. 11476 which would have created a broad federal system of compensation superimposed on the state system based on the Longshoremen's Act for all mining injuries. There was wide opposition to the latter. The Select Subcommittee on Labor did not report any bill.

However, the General Subcommittee on Labor amended H. R. 1047, the safety and health bill it had been considering, and reported it to the full Committee on Education and Labor on August 7, 1969. This bill included a limited provision for compensation from complicated pneumoconiosis. This was reported to the House as a clean bill on September 18. On September 24, the Committee voted that the clean bill, given the number of H. R. 13950, be reported to the House. It may be noted, as indicated above, that the Senate Committee on Labor & Public Welfare had reported its Coal Mine Health and Safety bill, without a compensation provision, on September 17, 1969. Some element of competition seems to have been present concerning priority of action on this subject between the two branches of the Congress.

H. R. 13950, as reported to the House, provided benefits for total disability from complicated pneumoconiosis or for death of a person when so disabled at the rate of 50% of that payable to a Federal Employee Grade GS-2 (next to lowest grade) under the Federal Employees Compensation Act. The same benefits would be payable to their widows, with increases if there were dependents. Basic compensation would be increased by 100% if there were 3 or more dependents. However, claim for this compensation had to be made within 1 year of the first x-ray examination provided for in the bill for employed miners and 3 years after enactment of the law. The intention to limit such compensation to persons suffering from the disease at the time the law was enacted is clear. Thus, it had only retroactive application as indicated by Mr. Dent, Chairman of the General Subcommittee on Labor which had reported the bill of which he was chief sponsor (P. 718, Legislative History, supra).

As indicated above, the Senate had passed S. 2917 on October 2, 1969 before the House considered H. R. 13950. Debate on that bill began on October 27, 1969 under a resolution providing that the House constitute itself a Committee of the Whole to consider and adopt amendments, then report the bill to the House without intervening motion except to recommit. After passage, it would be in order in the House to consider S. 2917 and move to strike all matter after the enacting clause and insert in lieu thereof the provisions of H. R. 13950 as passed the House.

Numerous amendments were proposed, many of which were adopted. Prior to vote on the measure, Congressman Scherle moved the bill be recommitted to the Committee on Education and Labor with instructions to delete the compensation provision, Sec. 112(b). That motion to recommit failed. (P. 920, Legislative History, supra). The bill then passed by roll call vote, 389 ayes, 4 nays, 38 not voting. Thereupon, in accordance with the resolution, the text of H. R. 13950 was substituted for that of S. 2917.

Conference Committee Report

Because of the differences in the measures as passed the House and Senate, a Conference Committee was created (P. 960, Legislative History, supra). With respect to black lung compensation, the major differences between the House and Senate bills were as follows. Under the Senate bill, benefits were to be paid by the states under guidelines issued by the Secretary of HEW. These would be fully funded by the federal government for the fiscal years ending June 30, 1970 and June 30, 1971 and 50% by the federal government and 50% by the states until June 30, 1973. In the meantime, the Secretary of HEW was to conduct a study. This was a benefit system of very limited scope and duration.

In the House bill, benefits approximately at the same scale were to be fully federally funded but only for miners totally disabled as of the effective date of the Act or shortly thereafter. Thus, it was intended to have only retroactive application. This was also a measure limited in scope.

The Conference Committee did not make its report until December 16, 1969, just before the holidays. To the great surprise of most interested parties with respect to the compensation provision for Black Lung, the measure as reported bore little resemblance to either the House or Senate bills.

Title IV of the Conference Committee bill now contained three parts. Part A covered definitions, including a broad definition of pneumoconiosis. The House bill had only been applicable to complicated pneumoconiosis, the disabling form of the disease. A broad definition of total disability was also included, to be at the discretion of the Secretary of HEW but not more restrictive than that under Social Security.

Part B, limited to persons employed in underground mines, provided for federally funded benefits payable by the Social Security Administration for claims made on or before December 31, 1972. This part newly included some far-reaching presumptions. After 10 years or more of employment in underground coal mines, there would be a rebuttable presumption that the pneumoconiosis arose out of the employment or in case of death from a respiratory disease that was due to pneumoconiosis. If (a) an x-ray showed an opacity greater than 1 centimeter (about 3/16 of an inch), or (b) massive lesions appeared in biopsy or autopsy, or (c) diagnosis by other means could be expected to yield results in (a) or (b), there was an irrefutable presumption of total disability. The latter irrefutable presumption was much broader than that applicable to social security disability benefits. Benefits were on the same basis as those in the House measure, being related to Grade GS-2 of the Federal Employees Compensation Act. These benefits, while initially low, are annually adjusted to the cost of living.

Benefits were to be reduced by workers' compensation payments under state law, unemployment insurance, non-occupational state disability benefits or social security disability benefits. Prior claim under the state worker's compensation law had to be filed unless the filing would be clearly futile. No benefits were to be paid after December 31, 1972 if claim was filed after December 31, 1971.

The greatest change, however, was the addition of a New Part C for claims after December 31, 1972.

This part, although it purported to encourage coverage by state workers' compensation laws, in effect created a federal compensation system for the payment of black lung benefits payable largely by industry. This system was intended to be temporary but since has been made permanent.

On and after January 1, 1973 (later amended to read January 1, 1974), claim would have to be made under state law except that during any period when a miner or surviving widow are not covered by a state Act "which provides adequate coverage for pneumoconiosis," they may claim benefits under this Part. The Secretary of Labor is to publish a list of states that are in compliance. The conditions of compliance were:

(1) payment of benefits for total disability or death of miner due to pneumoconiosis;

(2) benefits substantially equivalent or better;

(3) standards for determining death or total disability substantially equivalent to those in Part B;

(4) a 3-year statute of limitations running 3 years from the date of discovery of total disability due to pneumoconiosis or the date of death;

(5) provisions for present operators to assume liability of prior operators;

(6) provisions consistent with applicable provisions of the Longshoremen's Act (Sec. 421).

During any period of non-compliance, operators would have to insure or self-insure liability under this Part (§423).

Benefits under this Part would be reduced by the amount of compensation under any federal or state workers' compensation law because of death or disability due to pneumoconiosis. The Secretary would make appropriate regulations, including presumptions for determining whether pneumoconiosis arose out of employment in an underground mine. An operator who acquired a mine after the effective date of this Act would have to assume the compensation liability of a prior operator who was an operator of the mine after the effective date of this Title (§422).

In the case of a miner or his widow entitled to benefits, where the operator is uninsured or has not paid such benefit within a reasonable time or if there is no operator who is required to insure, the Secretary would pay the benefit with right of recoupment (§424).

Neither the Senate bill nor the House bill had contained any such provisions. As indicated above, the Conference report was made on December 16. The House agreed to the Conference report on December 17, and the Senate on December 18. Congressman Erlenborn raised a point of order pointing to the new provisions in the bill concerning compensation not present in the Senate or House versions (Page 1059 ff, Legislative History, supra). Under usual practice, a Conference Committee must merely reconcile differences between the two bills as passed by each branch of the Congress. The Chair ruled (Page 1016, Legislative History, supra) that where one House has stricken all after the enacting clause and inserted an entire substitute, the entire subject matter is committed to the conference who may report any provision germane thereto provided it remains within the broad outline of matter committed to conference.

Even though the Labor Department had indicated opposition to the bill as reported by the Conference Committee, the President approved the measure on December 30, 1969, accompanied by a message stressing the importance of the safety features of the law but expressing strong reservations about the compensation features of the act. He stated, "I want to emphasize very strongly that Title IV is temporary, limited and unique and in no way should be considered a precedant for future Federal administration of workers' compensation programs."* He also pointed out that the act may present problems of administration that require legislative changes. If such problems arise, he would propose corrective legislation.

Experience Under 1969 Enactment

This proved prophetic. Administrative problems arose almost immediately. When the law was enacted, both cost of the measure and the number of persons entitled to benefits were expected to be relatively limited. The Secretary of the Interior, after consultation with the Department of Labor, estimated the cost of the first year between 150 million and 383 million and the number of eligible active and retired miners from 40,700 to 54,400 (Page 1093, Legislative History, supra) and the 20 year cost between 1.2 and 2.7 billion. Advocates of this legislation thought these estimates were too high (Page 1085, Legislative History, supra).

Actually, within 1 month of enactment, almost 100,000 claims for benefits were filed, by the end of the first year 247,000 and by the end of the second year 348,000. (Report to the Congress, Achievements, Administrative Problems and Costs in Paying Black Lung Benefits to Coal Miners and their Widows, by the Comptroller General of the United States, September 5, 1972, page 2)

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* The Report of the House Committee on Education and Labor on H. R. 13950, in referring to the pneumoconiosis benefit provisions in the bill, similarly contains the following statement: "This program of payments - maintained in the bill by a committee vote of 25 to 9 - is not a workmen's compensation plan. It is not intended to be so and it contains none of the characteristic features which mark any workmen's compensation plan. Moreover, it is clearly not intended to establish a Federal prerogative or precedent in the area of payments for the death, injury, or illness of workers." Legislative History (supra) p. 570.

The Social Security Administration was overwhelmed by the flood of claims and the obligation to meet an unexpected responsibility for which they were totally unprepared and of which they had no prior notice. The Committee Staff Report on the Disability Insurance Program prepared for the House Committee on Ways and Means, July 1974 (pages 8 and 9) states:

> "The Black Lung program came out of 1969 legislation in which neither the House nor Senate versions contained a provision for the Social Security Administration to administer the program. The decision to give the Social Security Administration responsibility for administering the initial phase of the program was made by the conference committee in December 1969. Prelegislation planning for the implementation of Black Lung programs was nonexistent and its impact on the social security disability program was completely unassessed."

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> "At the present time, the Black Lung crisis has moved to the hearing stage where Social Security disability cases are being literally shunted aside so that the flood of Black Lung cases can be dealt with. The courts and the Social Security litigation staffs, who are already hard pressed, will soon be similarly adversely affected and their ability to carry out their Social Security disability duties will be further impaired. (Social Security responsibility will continue for Black Lung beneficiaries who applied prior to July 1, 1973, and the Social Security District Offices will continue to take applications for the Labor Department-administered Black Lung program until that program expires in 1981.)"

Even though the law contained broad presumptions and definitions and these were very liberally construed by the Social Security Administration, approximately 50% of the claims were denied. As of December 31, 1971, 347,716 claims had been filed with an allowance rate of 49.5%. Cumulative payments exceeded $532 million (Page 18, The Report of the Comptroller General, supra). That report emphasized that coal miners, like anyone else, contracted many conditions other than CWP (black lung) and some of these affected a person's ventilatory capacities in ways similar to CWP (Page 31 id.) including heart diseases, infectious diseases, muscular and neurological conditions, asthma, emphysema, bronchitis, etc. Even though the legislation was intended to compensate only total disability from complicated CWP, the disabling stage of that disease, affecting 3% or less of active miners and 9% of non-active,* benefits were awarded if the miner had simple CWP if he were disabled from other conditions. Medical records were also difficult to obtain for deaths occurring many years ago. In some cases, benefits were awarded if there was the "remotest possibility that CWP contributed to the death in any way" (id, P. 36). Denials were made only where evidence showed unequivocally that CWP did not contribute to the miner's death; i.e. hernia, cancer, etc. Of the miners' claims that were denied, 65.1% indicated that x-rays or biopsy did not show miner had CWP and 24.7% that he had simple CWP but was not disabled.

Nevertheless, many claimants whose claims were denied felt they should be compensated and so did other dependents who were not included in the benefit system.

Because the law was immediately effective and this vast responsibility was unexpectedly thrust upon the Social Security Administration without opportunity to prepare for it, delays had developed in the processing of claims while the rules of procedure and evaluation were formulated and field facilities were created. These delays no doubt served to add to the dissatisfaction with the operation of the law.

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* Pneumoconiosis in Aphalachian Bituminous Coal Miners by W. S. Lainhart, et al., Public Health Service Publication number 2,000, 1969, U. S. Department of Health, Education and Welfare, Superintendent of Documents, Washington, D.C. See also Mineral Resources and the Emvironment, Supplementary Report, Coal Workers' Pneumoconiosis - Medical Considerations, Social Security Implications, National Academy of Sciences (1976) P. 46-47. As of December, 1974, there were 118,700 coal miners, in December, 1975 181,800 coal miners and that in 1939 there were 434,056 coal miners.

1972 Amendments

In 1972, because of this pressure, the law was further liberalized. Since these benefits were payable out of general revenue, industry either did not testify on this amendment or where testimony was given, it was discounted because benefits were not then the obligation of industry.

The 1972 amendments:

1. Extended the social security part of the program (Part B) for 1 year.
2. Provided benefits to children, parents, and collateral dependents including students.
3. Broadened the definition of total disability. It was now considered totally disabling if pneumoconiosis prevented the miner from engaging in gainful work which required the skills and ability comparable to those of any employment in a mine in which he had been previously engaged over a substantial period of time.
4. Surface, as well as underground, coal miners were covered.
5. Death from any cause became compensable if the miner was totally disabled from pneumoconiosis at the time of death whether or not he had filed a claim for that condition.
6. A new presumption was added. If a miner was employed 15 years or more in an underground coal mine and a chest x-ray proved negative but other evidence demonstrated the existence of a totally disabling pulmonary or respiratory impairment, there would be a rebuttable presumption that he was totally disabled by pneumoconiosis, that his death was due to pneumoconiosis, or that at the

time of death he was totally disabled by pneumoconiosis. A wife's affidavit could supply that "other evidence" unless the miner was still living.

7. Claims could not be denied solely on the basis of x-rays but other evidence had to be considered, including a wife's affidavit or in case of death that of persons with knowledge of the miner's physical condition in addition to any medical evidence that might be available.
8. Benefits under Part B were specified not to be workers' compensation so that they could be paid in addition to social security disability benefits.
9. Benefits newly payable to children were retroactive to the date of enactment of eligibility if made within 6 months.
10. Claims filed after June 30, 1973 but before December 31 of that year would be paid by the Secretary of Labor but after that date by the responsible coal mine operator.
11. Part C was amended to require state laws to provide "adequate coverage" to children and collateral dependents as well as to miners and widows. Since state workers' compensation laws generally do not provide death benefits unless due to a work injury, this change virtually guaranteed that no state would qualify as providing "adequate benefits." Under the 1972 amendments, as noted above, death benefits are payable regardless of cause of death if the miner was "totally disabled" from pneumoconiosis at the time of death under the presumptions and definitions contained in that act.

12. Noncompliance by the state was further made more probable by a specific mandate requiring use by the states of the new definition of "total disability."

13. Claims under Part C based on the new presumption of the existence of pneumoconiosis and disability after 15 years employment in an underground coal mine would have to be filed within 3 years of last employment in case of a living miner or 15 years after last employment in case of death.

14. The effective period of Part C was extended from 7 years to 12 years.

15. An appropriation of $10 million was made to HEW to devise simple and effective tests to measure, detect and treat respiratory and pulmonary impairments of coal miners.

16. Claims which had been denied would have to be reviewed in light of 1972 amendments.

17. Amendments to Part B would be applicable to Part C, to the extent appropriate, except that employment after January 30, 1971 would not be included in determining application of 15 year presumption.

18. The Secretary of HEW was authorized to enter into contracts for examination and treatment of pulmonary diseases of active and inactive miners (§427). The original enactment had not provided for medical care.

Experience Under 1972 Amendments

As a result of the 1972 amendments, the Social Security Administration had to reopen 191,600 black lung cases. Of these, 110,000 were estimated to have been allowed (Committee Staff Report on the Disability Insurance Program, Committee on Ways and Means, supra, p. 416). Through June 30, 1973, 547,218 applications had been filed, of which 340,000 had been allowed (id. p. 415). This report indicates that the black lung program placed very severe strains on the Social Security Administration.

On July 1, 1973, the Labor Department assumed administration of the Act. However, claims continued to be filed in Social Security District Offices. The Labor Department paid claims out of public funds for the first six months. Thereafter, they were the responsibility of mine operators or their insurers unless (1) a responsible mine operator could not be found, (2) an operator failed to secure his liability, or (3) had not paid such benefit within a reasonable time. In case of the latter, the Department had a right of subrogation against the operator.

It was believed that most claims, particularly by inactive miners and their dependents, would have been filed under Part B and that only a limited number of claims would be filed by currently active miners. However, a relatively high level of claims continued, most by retired miners. By June 30, 1976, more than 92,000 claims had been filed - approximately 37,000 during the first year.

Difficulties developed in trying to identify a responsible operator. The law had been interpreted to mean the last "financially responsible" operator. Thus, a current operator could be held liable for benefits to a miner he had never employed but who had worked for a prior operator of the mine, sometimes many years ago. Such employment could be difficult to determine. Stricter medical rules had been promulgated by the Secretary of HEW for DOL claims than had previously been applicable by SSA. This also caused dissatisfactions. A backlog developed and the processing time for initially determining claims took over 600 days. (Black Lung Benefit Program, Office of Workers' Compensation Programs, U. S. Department of Labor, Task Force Report December 1976, p. vii, viii).

The rate of approval also dropped. The following table compares approval rates of the two administering agencies. Table is taken from "Black Lung - A Study in Occupational Disease Compensation" by Nancy Snyder, Employment Standards Administration and Mark E. Solomons, Office of the Solicitor, Department of Labor, Proceedings of the Interdepartmental Workers' Compensation Task Force Conference on Occupational Diseases and Workers' Compensation, 1976, 94th Congress, 2nd Session, Joint Committee Print, p. 762.

APPROVAL RATES

	04-30-71[1]	12-31-71[1]	12-31-72[2]	12-31-73[2]	12-31-74[1]	12-31-75[1]
SSA	49.0	49.5	49.3	62.1	64.2	N/A
DOL	-	-	-	-	18.7	13.5

1 Approval rates based on ratio of approvals to claims processed.
2 Approval rates based on ratio of approvals to claims filed.
N/A Not available.

A responsible operator was not notified that a claim was pending until the initial determination of compensability had been made. He then had 20 days (now 30, Rule 725.151) from the time of mailing the notice within which to admit liability or contest the claim. This did not provide sufficient time to investigate the claim, frequently involving employment long past and difficult questions of the nature and even the existence of disability. Many cases understandably were contested, especially since the constitutionality of some of the law's provisions were questioned.

All these factors gave rise to numerous complaints in the operation of the law. Payments out of public funds continued at a high level. In 1978, the federal government alone paid $1,022,625,000 (Workers' Compensation, 1978 Program Update, Daniel N. Price, Social Security Bulletin, October 1980, Vol. 43, No. 10, P. 8).

It was not long before further amendments to the law were being proposed. As had the Social Security Administration, the Labor Department was overwhelmed by the number of claims and the necessity of setting up procedures and training personnel to handle them. Coordination with another agency, the Social Security Administration, which still received the initial claim application, also presented problems in trying to find a responsible operator and trying to determine the physical condition of the miner, and its cause, upon which the claim was based.

Although broadening of definitions and presumptions in 1972 had served to aggravate fiscal and administrative problems, still broader presumptions and eligibility requirements were proposed. Early in 1976 such a bill passed the House (H. R. 10760, 94th Congress) but failed of enactment in the last days of adjournment in the Senate. It contained a provision for the payment of benefits to miners and their dependents after 30 years employment in an underground mine or 25 years in an anthracite mine regardless of the miner's actual physical condition. It also set up a special fund financed by a tax on coal for the payment of benefits.

After creating a system of compensation so burdensome and complex that the federal government was having difficulty in financing and administering it, there was a desire to transfer as much of the cost as possible to private industry.

1977 Amendments

This effort was continued early in 1977, resulting in the enactment of two amendments. One (H. R. 4544, Public Law 95-239, 95th Congress, effective March 1, 1978) again greatly broadened the scope of employments covered by the Act and the eligibility requirements under the Act. These broadened provisions were made retroactively applicable to Part B and Part C claims previously denied, as well as pending claims.

In 1972, these broadened liability provisions had also been made retroactive but were then payable out of public funds by the Social Security Administration. Now by means of obscure language inserted by the Conference Committee, which adapted language present in the Senate Bill (S. 1538, 95th Congress, 1st Session) reopened Part B claims originally made against SSA were apparently retroactively made the responsibility of mine operators or their insurers. This was a liability which did not exist when the policies were issued. The transfer of liability was intended to be achieved by providing that reopened Part B claims referred to the Department of Labor by the Department of HEW would be considered Part C claims and the date of request of review "shall be considered the date of filing" (Sec. 435).

The date of filing established the dividing line between Part C claims for which operators were responsible and Part B claims payable out of public funds. However, these claims had already been filed. Designating the request for review as the date of filing was a modification of actual facts by legislative action.

This legislation contained many other controversial provisions and few, if any, realized that this language was an attempt to place retroactive responsibility on operators and carriers for Part B claims that had been denied by Social Security. Operators and carriers were similarly retroactively newly made liable for pending and for reopened Part C claims which had been denied.

Among the broadened coverage and eligibility provisions of the 1977 legislation were the following:

1. Survivors would be entitled to benefits if the deceased miner was employed for 25 years or more before June 30, 1971 and died before March 1, 1978, the effective date of this Act [§411(c)].
2. The definition of miner was expanded to cover persons working in or around a coal mine or coal preparation facility and persons working in coal mine construction or transportation in and around a coal mine to the extent they are exposed to coal dust.
3. The rebuttable presumption of pneumoconiosis after 15 years of underground mining where the x-ray is negative is no longer limited to employment prior to June 30, 1971 (§430).
4. If there is no medical or other relevant evidence in the case of a deceased miner, the affidavit of a wife

or other person familiar with his condition shall be sufficient to establish total disability from pneumoconiosis and that death was due to that disease. This provision has resulted in awards where available medical evidence has been negative [Sec. 413(a)].

5. Where there is evidence of pulmonary impairment, the Secretary must accept interpretation of x-ray submitted in support of claim without rereading by experts, if (1) x-ray is of acceptable quality, (2) was taken by a qualified technician, (3) was interpreted by a board-certified or board-eligible radiologist and (4) claim is not fraudulently represented. Formerly, many x-rays had been found to be inaccurately initially interpreted [Sec. 413(b)]. Now rereading was prohibited.
6. Employment in mine shall not be conclusive evidence that miner was not totally disabled [§402(f)].
7. A miner is not entitled to benefits while engaged in coal mine employment, but shall be entitled to benefits if such employment terminates within 1 year after award of benefits becomes final.
8. The statute of limitations was broadened to run three years after medical determination of total disability due to pneumoconiosis. Previously, it had run from the date of discovery of total disability or from the date of death [Sec. 422(c)].
9. The definition of pneumoconiosis was broadened to cover "respiratory and pulmonary impairments arising out of coal mine employment." This vastly broadened the scope

of compensable conditions. "Pneumoconiosis" was thus further transformed into a "legal" rather than a "medical" disease.

10. Creation of a compensation insurance fund was authorized if insurance coverage is not otherwise available at reasonable cost (Sec. 433).
11. The Secretary of HEW must notify Part B beneficiaries of eligibility to receive medical benefits under Part C. The miner is given 6 months after notice to file a claim for medical services under Part C (Sec. 11).
12. The liability of subsequent operators to employees of prior operators was broadened (§422).
13. Penalties for not securing benefits were increased (Sec. 427).
14. The Secretary of Labor was authorized, in consultation with the Director of the National Institute of Occupational Safety and Health, to establish medical criteria for total disability. In the meantime, however, he was directed to apply the very broad "interim criteria" in effect for Part B claims on June 30, 1973, which had been superseded by subsequent HEW regulations. This served to broaden the scope of reopenings.
15. State compliance standards were modified not to require payment of benefits equal to those of the federal act where employment in a coal mine terminated before the Secretary's approval of the state act. Retroactive benefits has been one of the problems in connection with state compliance.
16. In the event payment of benefits could not be made from the Black Lung Disability Trust Fund, payments would be made as before the enactment of this Act (Sec. 20).

The Black Lung Disability Trust Fund was created by separate enactment (H. R. 5322, Public Law 95-227, 95th Congress, effective April 1, 1978). It was intended to relieve the federal government of the heavy financial burden it had assumed under the Black Lung Act. The fund was liable:

(1) for all claims by miners and their survivors in which the miner's last coal mine employment was before January 1, 1970; or

(2) where there was no coal miner operator required to secure benefits; or

(3) the operator had not commenced payment within 30 days of initial determination of eligibility; or

(4) the operator had not made payment within 30 days after it was due.

Thus, the Fund must make payment of benefits after an initial finding of eligibility even though a claim may be contested, but a responsible operator must refund such payments to the Fund if ultimately held liable. The retroactive features of the 1977 amendments, discussed above, present problems for operators where there is no coverage by the Trust Fund because there was employment after 1970 and no insurance because it was not required till after January 1, 1974.

The Fund was also liable for repayment to the Treasury for all amounts expended for claims under Part C paid before April 1, 1978, but need not pay or reimburse for benefits attributable to periods before January 1, 1974. The Fund was liable to reimburse the Treasury with interest also for any advances it may make to the Fund and for administrative expenses. Operators were also reimbursed for payments they had made before April 1, 1978 for claims of miners where last employment in the mines terminated prior to April 1, 1978.

The Fund was financed by a tax of 50 cents per ton of underground mined coal and 25 cents per ton of surface mined coal, but not to exceed 2% of the sale price of the coal. The law contained provision for tax deduction of such contribution. These were modified by H. R. 13167, Public Law 95-488, effective October 20, 1978.

Experience Under 1977 Amendments

These amendments immediately again created serious financial and administrative problems. Under the amendment, the Secretary of HEW had to notify all persons whose claims had been denied or were pending under Part B that upon the request of the claimant the Secretary of HEW would review the claim in the light of the new enactment or refer it to the Secretary of Labor to do so.

At the time of the 1977 amendment, SSA had about 165,000 previously denied Part B claims. Over 118,000 miners or survivors elected to have their claims reviewed under the new law. 82,434 elected SSA review and 36,104 chose Labor. As of September 19, 1979, SSA had approved 23,178 claims (28.1%). Reviewed claims which SSA had denied had to be referred to the Secretary of Labor. (Comptroller General Report to the Congress, July 28, 1980, H.R.D. 80-81, p. 1)

This Report, entitled "Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability," found after reviewing a random sample of 200 cases, re-reviewed and approved by SSA, that "in 88.5 percent of cases, medical evidence was not adequate to establish disability or death from black lung" p. 8. The Report emphasizes that these approvals were not contrary to law, but were mandated by various provisions of the law, such as that requiring that disability or death from black lung be established on the basis of affidavits of spouses and other dependents, use of inconclusive medical evidence and presumptions based on years of coal mine employment.

Projecting the results of the sample, the Comptroller General found that $312.9 million were paid to claimants in retroactive lump sump payments and $69.8 million additionally will have to be paid annually in cases which were not supported by adequate medical evidence of disability or death caused by black lung. These payments, under the statute, would retroactively become the obligation of coal mine operators and their insurers to the extent responsible operators can be identified. However, the validity of this legislation and its interpretation is being contested in the courts.

The Labor Department was similarly faced with an explosion of claims. Not only did they have to decide pending claims, but review old claims they had denied and SSA claims that had been reviewed again but denied. This further strained their resources.

The 1980 Department of Labor Black Lung Report to the Congress, covering the calendar year 1979, indicates it had received 343,987 claims, of which 94% had been filed since the 1977 amendments, as indicated by the following table (p. 5 of Report):

Type of Claims	Claims Received July 1973-Dec. 1979	Claims Approved 1973-1979	Claims Denied 1973-1979	Undetermined Claims as of Dec. 31, 1979
Part C				
New	37,503	6,855	12,202	18,446
Old	125,229	34,121	23,472	67,636
Part B	70,571	7,971	14,827	47,773
Social Security Approvals	23,972	23,952	---	20
Medical Only	86,712	82,561	---	4,151
TOTAL	343,987	155,460	50,501	138,026

These figures have been brought up-to-date in a Report by Conning & Company to the American Insurance Association dated July 1981 in the table attached hereto.

ACK LUNG PROGRAM
CLAIMS STATUS REPORT

June 12, 1981

Type of Claim	Total Received	FY 80 Received	FY 81 Received	FY 81 Decisions	FY 81 Approvals	FY 81 Denials	Total to Date Decisions	Total to Date Approvals	Total to Date Denials	Undecid Claims
					PART C CLAIMS					
435 Part C	125,229			9,837	2,884	6,953	125,229	56,957	68,272	(
New Part C	84,367	38,282	14,215	30,316	5,147	25,169	72,943	19,087	53,856	11,42
Subtotal	209,596	38,282	14,215	40,153	8,031	32,122	198,172	76,044	122,128	11,42
					PART B CLAIMS SSA Approvals - Part B Denials					
art B Denials	73,474	4,312	251	16,019	3,260	12,759	66,062	18,231	47,831	7,41
A Approvals	24,406	483	22	51	51	0	24,406	24,406	0	
Subtotal	97,880	4,795	273	16,070	3,311	12,759	90,468	42,637	47,831	7,41
					MEDICAL BENEFITS ONLY CLAIMS					
MBO, TF	100,243			14,020	14,020	0				
MBO, DO	16,733			1,644	1,644	0				
Subtotal	116,976	25,144	2,378	15,664	15,664	0	108,189	108,189	0	8,78
Grand Total	424,452	68,221	16,866	71,887	27,006	44,881	396,829	226,870	169,959	18,83

1/SSA Approved Claims that have not yet been placed into payment status.
2/Medical Benefits Only Claims that have not yet been placed into treatment status.
3/Unprocessed Medical Benefits Only Claims are not included in this number.

Conclusion

Payments by the federal government for Black Lung claims have exceeded $9 billion. Future liability on claims already allowed is estimated at several times that figure. This is a very costly program.

Coal mine operators and their insurers are now responsible for claims made after June 30, 1973 for employees employed in a mine after December 31, 1969. They mayalso be held liable for thousands of claims previously denied by the Social Security Administration and the Labor Department, but reopened under the retroactive provisions of the 1977 Act. This will depend on the interpretation and validity of that legislation as determined by the courts. The intent of the original law had been that claims involving long past exposures would be paid out of public funds.

The coal industry as a whole is responsible through the Trust Fund, maintained by the tax on coal, for claims involving employment prior to January 1, 1970 and for reimbursement of payments made out of public funds by the Labor Department. The financial condition of the Trust Fund is under review.

The Federal Black Lung program was intended to have been temporary. Responsibility was to have been returned to the state workers' compensation system. All states now provide black lung benefits. Most did so at the time the federal act was enacted but these did not apply (except Pennsylvania) to disability due to long past exposures. In Pennsylvania, a small pension from public funds has been payable for these old cases. No state law, however, has been certified as complying with the federal act. Some states originally tried to comply but qualifications for compliance were modified in 1972. Since then, they have not adopted provisions required by the federal act, which have caused difficulties at the federal level.

Federal difficulties have been seriously aggravated by twice changing eligibility requirements retroactively. Hundreds of thousands of claims have had to be reviewed again in the light of these changes. It was apparently thought that by loosening eligibility requirements, claim review would be speeded up. But each time new rules, new procedures, new interpretations, new litigation have resulted. As the 1980 Report of the Comptroller General (supra) indicates, many persons and their dependents are receiving and will receive benefits where there is no adequate medical evidence of disability or death from black lung.

Contraction of black lung from coal dust is a serious hazard in the coal industry. Miners perform difficult jobs in a difficult environment. This was especially true in the past. The dust hazard is being diminished by health measures and hopefully will eventually be eliminated or at least greatly reduced. Claims, however, have far exceeded what medical studies have indicated to be the incidence of the disease. Provisions in the law which encourage what are at best questionable claims cause delays for all and create serious problems in financing benefits.

Review of the law in the light of the facts might be warranted. At least, responsible operators and their insurers should be relieved of the retroactive liability which the 1977 legislation has created. If it is to be imposed upon the industry, it should be payable out of the Trust Fund so that all of the industry and not individual operators, who may not even have employed the miner, share the cost. Legislation to that effect passed the House at the last session of the Congress and a similar measure is under consideration.

Senator NICKLES. This meeting is adjourned.

[Whereupon, at 3:47 p.m., the subcommittee was adjourned.]